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ADVERSE POSSESSION AND SUBJECTIVE INTENT: A REPLY TO PROFESSOR HELMHOLZ

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It might be supposed that there is no longer anything worth saying with respect to the legal doctrine of "adverse possession." Recently, however, in an effort to explain "the large volume of litigation on the subject" between 1966 and 1983, Professor R.H. Helmholz undertook a survey of the cases decided during that period to "test the possibility that subjective factors have continued to play an important role in litigation," contrary to "the view that looks to pure possession as the relevant test," which he characterized as "the dominant view among commentators on the law of real property."[1] Professor Helmholz's principle conclusions are that:

(1) "the accrual of a cause of action" against the adverse claimant and in favor of the true owner is "irrelevant" in most adverse possession cases;[2]

(2) "the bulk of recent cases require . . . formulation of the rule [as to adverse possession so as to recognize] the relevance of the subjective intent of the possessor in determining whether or not he may validly acquire title by the passage of the statutory period [of limitation];[3]

(3) "[t]he cases . . . do not show that the adverse possessor must

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1. *See* Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U.L.Q. 331, 331-33 (1983) [hereinafter cited as *Adverse Possession*].

2 *Id.* at 334-36. Professor Helmholz states that in certain recurring situations in which the question is whether one party has acquired title by adverse possession, "[t]o approach that question by asking about the availability of ejectment is to invite laughter." *Id.* at 335.

3 *Id.* at 332.

plead and prove that he [actually] acted in good faith . . . [b]ut the cases do clearly show that the trespasser who knows that he is trespassing stands lower in the eyes of the law . . . than the trespasser who acts in an honest belief that he is simply occupying what is his already."[4]

At the outset, one should note that the number of appellate cases on adverse possession decided in the period that Professor Helmholz surveyed is not really excessive when compared, for example, with the number of appellate decisions during the same period dealing with bailments,[5] a subject as to which one might also expect the law to be so well-settled as to preclude excessive litigation. Moreover, one should note that almost half the cases that Professor Helmholz cited as directly supporting his conclusions were intermediate appellate court decisions with only limited significance as precedents,[6] rather than decisions of courts of last resort. Professor Helmholz's conclusions differ so greatly from generally accepted views[7] as to justify a careful look at the cases on which he

4. *Id.*

5. The 8th Decennial Digest (1966-1976) and the 9th Decennial Digest, Part 1 (1976-1981) contain a total of 169 pages devoted to "Adverse Possession," and a total of 112 pages devoted to "Bailment." In the 8th Decennial Digest, the first three key numbers devoted to "Bailment" include 134 different cases. Although Professor Helmholz examined a total of about 850 appellate opinions, "[m]any of the cases bore no relation to the subject" in which he was interested—the subjective intent of the adverse claimant—and "[t]he variety and complexity of many of the cases disappointed" his "hopes of adopting a statistical approach." *Adverse Possession, supra* note 1, at 333-34. Although Professor Helmholz cites a substantially larger number of cases, only about 105 cases are cited as directly supporting his conclusions. *See id.* at 335 nn.13-15, 338 nn.27-31, 340-41 nn. 38-45, 342-48 nn.48-71.

6. *See Adverse Possession, supra* note 1 at 335 nn.13-15, 338 nn.27-31, 340-41 nn.38-45, 342-48 nn.48-71. Intermediate appellate court decisions obviously cannot change a rule of law established by prior decisions of the state's highest court. Even when an intermediate appellate court purports to establish a new rule on a point that the state's highest court has not yet decided, its decisions may not have statewide precedential value if the intermediate court is divided into panels assigned to separate geographical districts. And the opinions of many appellate court panels must be viewed with considerable skepticism in light of the widely varying quality of such panels. Skepticism is especially necessary in assessing the opinions of the Texas Court of Civil Appeals panels, which have become a subject of humorous comment among lawyers both in Texas and elsewhere. It is worth noting that Professor Helmholz cites an inordinate number of decisions from the Texas Court of Civil Appeals.

7. The "generally accepted views" are those stated in 3 AMERICAN LAW OF PROPERTY §§ 15.2, 15.4 (A. Casner ed. 1952) [hereinafter cited as AM. L. PROP.]; AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW OF PROPERTY § 458 (1944); 4 H. TIFFANY, THE LAW OF REAL PROPERTY §§ 1142, 1147-1149 (rev. 3d ed. Supp. 1985) [hereinafter cited as H. TIFFANY]; R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY § 11.7 (1984) [hereinafter cited as R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN]; 1 W. WALSH, COMMENTARIES ON THE LAW OF PROPERTY ch. 3 (1947). The Walsh treatise is practically identical with 3 AM. L. PROP. Part 15, ch. 1, because preparation of the latter was originally assigned to Professor Walsh but, some time

based his conclusions. The remainder of this article is therefore devoted to an analysis of these cases and a critique of his conclusions.

I. THE RELATIONSHIP OF THE "ELEMENTS OF ADVERSE POSSESSION" TO ACCRUAL OF A CAUSE OF ACTION

A. In General

Professor Helmholz's conclusion that the accrual of a cause of action against the adverse claimant is "irrelevant" in adverse possession cases is based upon his assertion that the courts "focus on whether or not the trespasser has fulfilled the five positive requirements of adverse possession: that is, hostility under claim of right, actual possession, openness and notoriety, exclusivity, and continuity," rather than "looking for the accrual of a cause of [action in] ejectment."[8] Concededly, these "positive requirements," which are generally not expressly mentioned in statutes

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prior to his death in 1946, was reassigned to R.G. Patton with a suggestion that Mr. Patton should use the material on adverse possession that Professor Walsh had previously published in the New York University Law Quarterly. Mr. Patton acted on this suggestion. *See* 3 AM. L. PROP, *supra* at 755, explanatory footnote. Chapter 3 of Professor Walsh's COMMENTARIES ON THE LAW OF PROPERTY, posthumously published in 1947, also incorporated the same material from the New York University Law Quarterly articles.

8. *Adverse Possession, supra* note 1, at 334-35. So long as the common-law forms of action were in use, "ejectment" was the form of action generally available for recovery of the possession of land, although a "writ of entry" was used for that purpose in Massachusetts from an early date because it was considered "more simple, convenient and effectual than the action of ejectment." A. SEDGWICK & F. WAIT, TRIAL OF TITLE TO LAND § 70 (2d ed. 1866) [hereinafter cited as A. SEDGWICK & F. WAIT]. Moreover, an action performing the same function as "ejectment" but termed "trespass to try title" was adopted in South Carolina, Alabama, and Texas; it has survived only in Texas. *Id.* at §§ 81-92.

At the present time, almost all American jurisdictions have statutory actions to recover possession of land that have superseded "ejectment," the "writ of entry" and "trespass to try title." It should be noted, however, that a substantial majority of all the cases Professor Helmholz cites as directly supporting his conclusions as to the importance of "subjective intent," "good faith," and "bad faith" involve in substance either an action or a counterclaim by an adverse possessor to "quiet title" against the record owner. This strongly suggests that in many states, especially in the South and West, the "quiet title" action has largely superseded the action at law to recover possession of land as a vehicle for determining whether an adverse claimant in possession of land has acquired title by adverse possession. Indeed, the leading treatise on equity jurisprudence states that a statutory "quiet title" action "in many states is the ordinary method of trying disputed titles." 4 J. POMEROY, EQUITY JURISPRUDENCE § 1396 (rev. ed. Symons 1941). In a number of states either a plaintiff in possession or a plaintiff out of possession may bring a statutory "quiet title" action. See *id.* listing the following states as having statutes allowing a "quiet title" action whether the plaintiff is in or out of possession: Arizona, California, Florida, Hawaii, Idaho, Indiana, Iowa, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, South Dakota, Utah, Washington, and Wisconsin. In these states a statutory "quiet title" action performs the

limiting the time within which actions to recover possession of land may be commenced, are the subject of more judicial discussion than the question whether a cause of action against the adverse claimant has accrued to the true owner. But careful reflection on the meaning of these "positive requirements" should lead to the conclusion that the dichotomy suggested by Professor Helmholz's assertion is false. These "positive requirements" are, in fact, judicial criteria developed to determine whether the adverse claimant's conduct gave the true owner of the land a cause of action for recovery of possession that continued for the full statutory period of limitation before the true owner began such an action.[9]

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functions of both an action at law to recover possession (when the plaintiff is out of possession) and a suit in equity to "quiet title" (when the plaintiff is in possession).

For an extensive listing of cases cited in *Adverse Possession* involving, in substance, a "quiet title" action, see *infra* notes 239 & 240.

9. The adverse claimant's possession must be such as to give the true owner a right of action for a continuous period equal to the statutory limitation period. *See* Sullivan v. Zeiner, 98 Cal. 346, 33 P. 209 (1893); Moss v. Scott, 32 Ky. (2 Dana) 271 (1834); Chessman v. Hale, 31 Mont. 577, 79 P. 254 (1905); Lewis v. Pope, 86 S.C. 285, 68 S.E. 680 (1910); Portis v. Hill, 3 Tex. 273 (1848); Northern Pac. Ry. v. Spokane, 45 Wash. 229, 88 P. 135 (1907); Wilson v. Braden, 56 W. Va. 372, 49 S.E. 409 (1904).

In *Adverse Possession, supra* note 1, at 335 nn.13-16, Professor Helmholz cites three cases to support his assertion that, in certain adverse possession cases, to approach the question whether title has been acquired by adverse possession by asking about the availability of ejectment "is to invite laughter." In fact, however, each of the cited cases can properly be analyzed in terms of "the accrual of a cause of action." Thus, in Conwell v. Allen, 21 Ariz. App. 383, 519 P.2d 872 (1974), the court held that "planting and maintaining the grass on the disputed area" did not amount to "open and notorious possession," which is required to give the true owner a cause of action. In Burnett v. Knight, 428 S.W.2d 470 (Tex. Civ. App. 1968), the court held that the adverse claimant failed to prove "exclusive" possession—which is required to give the true owner a cause of action—when use of a strip of land as a means of ingress and egress by those attending baseball games was of as much benefit to the owners of the disputed strip and the tract on which the stadium was located as it was to the adverse claimants, who owned a smaller tract on which the cars that "ingressed and egressed to the ball games over the disputed strip" were parked. Finally, in Hemon v. Rowe Chevrolet Co., 108 N.H. 11, 226 A.2d 792 (1967), the adverse claimant had planted spruce trees along the edge of the disputed strip and the trees had later grown until they blocked the true owners' access to the strip. The court was primarily concerned with the question whether the evidence clearly showed that the adverse claimants had proven "open, adverse, exclusive and notorious use under a claim of right" beginning at a time more than 20 years before the true owners brought the action. This concern clearly indicates that the court attached primary importance to the "accrual of a cause of action." The court held that the evidence supported the trial court's decision that the required possession was not established early enough to allow the 20-year statutory limitation period to run before the action was brought.

In each of these three cases, both the stated and the actual ground of the decision was that the adverse claimant had failed to establish the kind of possession necessary to give the true owner a cause of action to recover possession of the land in question early enough to allow the running of the full statutory limitation period.

Apparently, development of these criteria was at least in part a corollary of the courts' recognition, early in the nineteenth century, that when the statute of limitations barred the true owner's right to recover possession all his other legal and equitable rights, comprising his "title" to the land, were also extinguished,[10] and that the adverse possessor thereupon became the new owner of the land.[11]

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10. Under American statutes, as under the Statute of James I, there may be some remedies which are not expressly affected by the terms of the statute. But when the statute extinguishes the remedy in ejectment to recover possession, the common law and also equity say that the possession shall not be questioned by the former owner in any other manner, either by self-help, by action of trespass, or by a bill in equity . . .
. . . As the Supreme Court of Wisconsin has pointed out, it would be a strange anomaly to hold that the law which bars the owner from recovering possession . . . should yet leave him at liberty to assert title in other ways as by action of trespass for mesne profits, by extra-judicial re-entry or by suit in equity to quiet title, for partition or for an accounting. It seems a necessary consequence of the policy underlying the limitation acts that one should be considered to have no right or title when the most essential incident or legal consequence of title, the right to recover possession, is barred. Hopeless confusion would result from the recognition of any such anomalous titles, without right of possession, surviving the statute. The maxim that where there is a right there is a remedy may be turned about . . . so that where there is no remedy there is no right. The only cloud on the possessor's title is the true owner's right to recover possession by entry or ejectment, or by some other remedy, and when these remedies are all taken away by the statute or by analogy thereto, the defect in the possessory title [is] cured.

Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 140-41 (1918).

The cases cited by Professor Ballantine include Elmendorf v. Taylor, 25 U.S. (10 Wheat.) 152 (1825), and Humbert v. Trinity Church, 24 Wend. (N.Y.) 587 (1840). The proposition stated by Ballantine was established in England by the Real Property Limitation Act of 1833, 3 & 4 Wm.IV, c. 27.

11. Most of the American limitation statutes do not expressly provide that the former true owner's title shall be extinguished and a new title created when the statute bars the true owner from bringing an action. But in a few states, the statutes do so provide, as they have in England since 1833. *See* ALASKA STAT. § 09.25.050 (1984); COLO. REV. STAT. § 38-41-101 (1982); GA. CODE ANN. §§ 44-5-163, 44-5-164 (1982); KY. REV. STAT. § 413.060 (1979) (if adverse claimant has "connected" title of record); MISS. CODE ANN. § 15.1-11 (1972); OKLA. STAT. ANN. tit. 60, § 333 (West 1971); R.I. GEN. LAWS § 34-7-1 (1984); TENN. CODE ANN. § 28-2-105 (1980) (if adverse claimant claims under color of title that has been of record for 30 years); TEX. REV. CIV. STAT. ANN. § 5513 (Vernon 1958).

Although California, Florida, Montana, North Carolina, and Pennsylvania are also listed as having statutes vesting title in the adverse possessor at the end of the limitation period, in Taylor, *Titles to Land by Adverse Possession,* 20 IOWA L. REV. 551, 563 (1935), none of these states actually has such a statute. In New Jersey there are 30-year and 60-year statutes of limitations that expressly provide for vesting of title in the adverse possessor. But these statutes have little practical importance because New Jersey's 20-year statute of limitations has been held to have the same effect, although it does not expressly provide for vesting of title in the adverse possessor. *See* Cunningham, *Real Property,* 10 RUTGERS L. REV. 249, 251-53 (1954).

Alabama has perhaps the strangest congeries of statutes and legal doctrines relating to adverse possession. Under ALA. CODE § 828 (1958), after 10 years of adverse possession either under "color of title" or with the land properly listed for taxation to the adverse possessor, the adverse possessor may acquire title, although the statute does not explicitly provide for this result. ALA. CODE § 20

In any case, judicial development of the "positive requirements of adverse possession" was not, as Professor Helmholz asserts, a consequence of the failure of most courts to distinguish adverse possession from "prescription."[12] Professor Helmholz cites no authority in support of this assertion,[13] and, despite occasional loose statements to the effect that "title by adverse possession is the equivalent of title by prescription,"[14] most of the courts that allow "title" to "corporeal" as well as "incorporeal" interests to be established by "prescription"[15] draw a distinction between adverse possession and prescription. As applied to "corporeal" interests (*i.e.*, possessory estates) "prescription" generally rests on the theory that long-continued possession of land justifies a presumption that such possession is based on a "lost grant"[16] and is therefore rightful. Some cases

(1958), bars ejectment unless the owner brings his action within 10 years, but does not expressly impose the requirements stated in § 828. Under a separate and distinct doctrine of "prescription," possession for 20 years confers title on the adverse claimant even though he fails to satisfy the requirements stated in § 828. For a discussion of possible anomalous results, see Note, *Adverse Possession in Alabama,* 28 ALA. L. REV. 447, 455 (1977).

12. *See Adverse Possession, supra* note 1 at 335 ("The fundamental distinction, frequently made by the commentators, between title by prescription and title by adverse possession, simply does not exist in the case law.").

13. Professor Helmholz cites no case in support of the statement quoted *supra* note 12, nor is it supported by any of the cases subsequently cited in *Adverse Possession.* Professor Helmholz also states that, in some jurisdictions, there are "prescriptive title statutes, which define the means of acquiring title by adverse possession" and "typically spell out the five affirmative requirements for prescriptive title, restating the required length of possession found in the statute of limitations." *See Adverse Possession, supra* note 1 at 334-35, *citing* Taylor, *supra* note 11 at 551-54. However, Professor Taylor's article provides no support for this statement. Apparently Professor Helmholz had in mind statutes like N.Y. REAL PROP. ACTS. LAW §§ 511-22, which defines "adverse possession" but does not purport to "vest title" in the "adverse possessor."

14. *See, e.g.,* Fiest v. Steere, 175 Kan. 1, 7, 259 P.2d 140, 144 (1953).

15. *See* 3 AM. L. PROP., *supra* note 7, at § 15.15; 4 H. TIFFANY, *supra* note 7, at § 1136; 5 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 2540A (1957) [hereinafter cited as G. THOMPSON] for cases from about 20 jurisdictions holding or stating that a "corporeal" interest (*i.e.*, a possessory estate) can be acquired by "prescription." But courts in other jurisdictions have frequently stated that only "incorporeal" interests such as easements and profits can be acquired by "prescription." *See* 2 G. THOMPSON, *supra* at § 335.

16. *See* 3 AM. L. PROP., *supra* note 7, at § 15.16; 4 H. TIFFANY, § 1136; 5 G. THOMPSON, *supra* note 15, at § 2540A. *See also* Hill v. Hill, 55 Tenn. App. 589, 403 S.W.2d 769 (1964), stating that the presumption on which the possessor's "prescriptive title" was based "arises independent of the statute of limitations." Professor Helmholz cites *Hill,* see *Adverse Possession, supra* note 1, at 355 n.93, for a different point. Apparently he did not realize that *Hill* is inconsistent with his statement that the distinction between "title by prescription and title by adverse possession" simply "does not exist in the case law." *See supra* note 12.

Although the presumption of a "lost grant" played an important part in the development of the doctrine of "prescription" as applied to "incorporeal" interests such as easements and profits, it seems to have faded into the background in twentieth-century cases dealing with easements and

treat the presumption as one of law to be applied by the court,[17] while other courts treat it as one of fact to be determined by the jury.[18] Exactly how long the possession must have continued is not well-settled,[19] but in most of the cases in which the claimant succeeded on the basis of a presumed "lost grant" the period was far in excess of the period required by the jurisdiction's statute of limitations.[20] In any case, a title established by "prescription" pursuant to a presumed "lost grant" is one based on a long-continued possession that is considered to have been rightful, while a title based on adverse possession is based on an admittedly wrongful possession for the statutory limitation period. When the character and duration of the claimant's possession are such as to support a claim of title by adverse possession, there is no need to rely on the presumption of

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profits. *See* 2 AM. L. PROP., *supra* note 7, at §§ 8.44-8.58; 2 G. THOMPSON, *supra* note 15, at §§ 335, 337. Thus the doctrine of "prescription" as applied to easements and profits has become more like the doctrine of "adverse possession" as applied to possessory estates, and less like the doctrine of "prescription" as applied to possessory estates.

17. *See, e.g.*, United States v. Fullard-Leo, 331 U.S. 256, 270 (1947), in which the Court said, "The presumption of a lost grant to land has received recognition as an appropriate means to quiet long possession. It recognizes [the fact] that lapse of time may cure the neglect or failure to secure the proper muniments of title, even though the lost grant may not have been in fact executed." The Court cited an earlier case for the rule that the legal presumption of a "lost grant" would arise "wherever, by possibility, a right may be acquired in any manner known by law." *Id.* at 271. *Accord* Kidd v. Browne, 200 Ala. 299, 76 So. 65 (1917); Reed v. Money, 115 Ark. 1, 170 S.W. 478 (1914); Dunn v. Eaton, 92 Tenn. 743, 23 S.W. 163 (1893).

18. *See, e.g.*, Summer v. Child, 2 Conn. 607 (1818); State v. Dickinson, 129 Mich. 221, 88 N.W. 621 (1901); Rosenbaum v. Bohannon, 204 Miss. 9, 36 So. 2d 798 (1948).

19. The cases do not ordinarily specify the length of the period which will be sufficient to justify the presumption of a grant. It would appear, however, that insofar as the presumption is regarded as a rule of law, calling for the finding of a grant without regard to the actual belief of the jury therein, it must be supported by a possession of at least the period of the statute of limitations . . . When the presumption, so called, involves merely an inference of the making of a conveyance from the facts of possession, taken in connection with other circumstances, it seems that a period of possession less than the limitation period might properly be considered in aid of the inference.

4 H. TIFFANY, *supra* note 7, at § 1136. In Alabama, North Carolina, South Carolina, and Tennessee, the prescriptive period has been fixed at 20 years, although the maximum statutory limitation period for acquisition of title by adverse possession is now shorter in Alabama (10 years), South Carolina (10 years), and Tennessee (7 years). The 20-year prescriptive period is apparently derived from the Statute of 21 James I ch. 16 (1624), which established a 20-year limitation period for ejectment actions that was widely adopted in the United States at an early date. For discussion of the doctrine of "prescriptive title" in Alabama, see *supra* note 11, at 447 & nn.2, 449 & n.12, & 453 & n.44 and accompanying text.

20. *See, e.g.*, Kidd v. Browne, 200 Ala. 299, 76 So. 65 (1917) (about 60 years); Reed v. Money, 115 Ark. 1, 170 S.W. 478 (1914) (57 years); Coleman v. Coleman, 17 S.C. 518, 51 S.E. 250 (1905) (about 33 years); Donegal Township School Dist. v. Crosby, 178 Pa. Super. 30, 112 A.2d 645 (1955) (55 years); Dunn v. Eaton, 92 Tenn. 743, 235 S.W. 163 (1893) (over 43 years); Hill v. Hill, 55 Tenn. App. 589, 403 S.W.2d 769 (1964) (about 60 years).

a "lost grant". In some cases, however, a claimant who would clearly fail if he relied on adverse possession may succeed on the basis of a presumed "lost grant", *e.g.*, when the claim is made against the state or federal government[21] or when the claim is made by a governmental agency with the power of eminent domain.[22]

None of the cases Professor Helmholz cites in his article holds that accrual of a cause of action to the true owner for recovery of possession of his land is irrelevant in the law of adverse possession. Moreover, Professor Helmholz's admission that the statute of limitations will not run against the owner of a future interest who, by definition, has no present right to possession undercuts his conclusion that accrual of a cause of action is irrelevant.[23] The statute of limitations will not run against the owner of a future interest precisely because the latter has no cause of action for recovery of possession so long as he has no present right of possession.[24]

In view of Professor Helmholz's repeated references to persons claiming title by adverse possession as "trespassers,"[25] it should be emphasized that the requisite cause of action is one for recovery of possession rather than one to recover damages for a single trespass or a series of tres-

21. *See, e.g.*, United States v. Fullard-Leo, 331 U.S. 256 (1947); United States v. Chaves, 159 U.S. 452 (1895); Carter v. Walker, 186 Ala. 140, 65 So. 170 (1914); McCain v. Wilson, 176 Ark. 1205, 5 S.W.2d 338 (1928); Trustees of Schools of Tp. No. 8 v. Lilly, 373 Ill. 431, 26 N.E.2d 489 (1940); Kentucky Block Fuel Co. v. Roberts, 207 Ky. 137, 268 S.W. 802 (1925); J.H. Leavenworth & Son, Inc. v. Hunter, 150 Miss. 245, 116 So. 593 (1928); May v. Morganton Mfg. & Trading Co., 164 N.C. 252, 80 S.E. 380 (1913); Clary v. Bonnett, 114 S.C. 452, 103 S.E. 779 (1920). Sovereign immunity generally prevents any statute of limitations from running against the state or federal government.

22. *See* Donegal Township School Dist. v. Crosby, 178 Pa. Super. 30, 37, 112 A.2d 645, 648 (1955) ("there is authority for the proposition that where a right of eminent domain exists in a corporation, it cannot claim by adverse possession," but "the doctrine of presumptive grant" can be applied if the corporation could have obtained property by purchase or gift).

23. *Adverse Possession, supra* note 1, at 336.

24. *See* 3 AM. L. PROP., *supra* note 7, at § 15.8 ("A reversioner or remainderman during the continuance of a prior life estate is not affected by the statute because his action in ejectment to recover the property does not arise until the life estate ends, as the life tenant alone can maintain the action."); P. BAYSE, CLEARING LAND TITLES, § 55 (2d ed. 1970); 2A R. POWELL, REAL PROPERTY 300 (rev. ed. P. Rohan 1981) [hereinafter cited as R. POWELL]; 7 *id.* at § 1017; 4 H. TIFFANY, *supra* note 7, at § 1152; 5 G. THOMPSON, *supra* note 15, at § 1152.

Cases holding that "the tenant in common out of possession should not be barred by his cotenant's activities, no matter how long continued, until the cotenant in possession disavows the tenancy by an unequivocal act," *Adverse Possession, supra* note 1, at 336, are also based on the fact that the cotenant out of possession has no cause of action against the occupying cotenant unless the latter "excludes" or "ousts" the former, either actually or constructively.

25. *See, e.g., Adverse Possession, supra* note 1, at 334, 335, 338 ("knowing trespass") and *passim*.

passes[26] or to enjoin a series of trespasses.[27] Adverse possession is more than a mere temporary wrongful interference (or a series of interferences) with the true owner's exclusive right to possession.

The relevance of a judicial determination that the true owner did have a cause of action to recover possession of land that he failed to assert within the statutory limitation period will become clearer when this article considers in more detail the relation between each of the "five positive requirements of adverse possession" and the "accrual of a cause of action."

B. The Five Positive Requirements of Adverse Possession

1. "Actual Possession"

The reason that an adverse claimant must show that he had "actual" possession of at least part of the land he claims is that the true owner

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26. An action of ejectment or its modern equivalent obviously cannot be maintained unless the defendant is in possession. A. SEDGWICK & F. WAIT, *supra* note 8, at § 93. Conversely, an action to recover damages for trespass or to enjoin the continuation of a series of trespasses cannot be maintained if the defendant is in possession when the action is brought. In the latter case, the plaintiff must first establish his right to possession by an ejectment action or its modern equivalent. *See, e.g.*, Wood v. Michigan Air Line Ry. Co., 90 Mich. 212, 51 N.W. 265 (1892); McMillan v. Turner, 52 N.C. 435 (1860); Tredwell v. Reddick, 23 N.C. 56 (1840). No cited authority supports a statement apparently to the contrary in D. DOBBS, REMEDIES § 5.8 (1973) [hereinafter cited as D. DOBBS]. The statement probably refers to cases in which the defendant has created a "continuing trespass or nuisance." In such cases, ejectment or its modern equivalent is not an appropriate remedy, and the plaintiff may therefore sue repeatedly in trespass for damages or, if the trespass or nuisance is "permanent," may recover all damages for past and prospective injury in a single action. *See id.* at §§ 4.6, 5.4. At common law, a plaintiff could neither maintain trespass while the defendant was in possession or join a claim in trespass for "mesne profits" with an ejectment action; instead, he was required first to recover possession and then to bring a separate trespass action to recover the "mesne profits." In most jurisdictions, by statute, the plaintiff either may, or must, recover the "mesne profits" in the action to recover possession of the land. *See* J. KOFFLER & A. REPPY, COMMON LAW PLEADING § 106 (1969); A. SEDGWICK & F. WAIT, *supra* note 8, at § 62.

In Texas the modern equivalent of ejectment is called "trespass to try title." TEX. PROP. CODE ANN. §§ 22.001, 22.002 (Vernon 1984). This action differs from ejectment because it may be maintained on the strength of either a "legal" or an "equitable" title, while "ejectment" requires a "legal" title. *See* J. KOFFLER & A. REPPY, *supra*, at § 107. For the history of the "trespass to try title" action, see A. SEDGWICK & F. WAIT, *supra* note 8, at §§ 81-91.

27. As a general rule no injunctive relief can be awarded if the defendant is in possession of plaintiff's land; in that case, ejectment or its modern equivalent is normally the proper and adequate remedy. But the plaintiff may be able to obtain injunctive relief against repeated trespasses by the defendant. *See* D. DOBBS, *supra* note 26, at § 5.6; A. SEDGWICK & F. WAIT, *supra* note 8, at § 174. When ejectment would not be appropriate because a sheriff cannot enforce a judgment for the plaintiff (*e.g.*, when the defendant constructs a substantial building that encroaches on the plaintiff's land), a court may grant injunctive relief. *See* D. DOBBS, *supra* note 26, at § 5.6. Alternatively, a court may award full damages for all injury to the plaintiff, past and prospective. *See id.* at § 5.4.

would otherwise have no cause of action for recovery of possession. New York and a number of other states expressly define "actual" possession in their statutes of limitations.[28] Absent a statutory definition, the concept of "actual" possession is quite flexible.

> Neither actual occupancy, cultivation nor residence is necessary to constitute actual possession of land. Where property is so situated as not to admit of permanent useful improvements, the continued claim of the party, evidenced by public acts of ownership such as he would exercise over property which he claimed in his own right and would not exercise over property which he did not claim, may constitute actual possession.[29]

In short, one may establish "actual" possession by acting as if he were the owner of the land.

When an adverse claimant holds the property under "color of title," he must still prove "actual" possession of some part of the tract described in the document constituting his "color of title," in which case he will be deemed to have had "constructive" possession of all of the balance of the tract not "actually" possessed by the true owner.[30] In New York and several other states, the limitation statutes expressly define "color of ti-

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28. *See* N.Y. REAL PROP. ACTS. LAW § 522 (Consol. 1979), which provides that when there is no "color of title," the land "is deemed to have been possessed and occupied" only (1) "[w]here it has been usually cultivated or improved" or (2) "[w]here it has been protected by a substantial inclosure." This language is derived without modification from the N.Y. Revised Statutes of 1828, and can be found either verbatim, or, with some modifications, in the limitation acts of California, Florida, Idaho, Montana, Nevada, North Dakota, South Carolina, South Dakota, and Utah. The limitation acts of North Carolina and Wisconsin were originally derived from the N.Y. Revised Statutes of 1828, but they have been more substantially modified. *See* Bordwell, *Disseisin and Adverse Possession* 33 YALE L.J. 141, 149 & nn.178-79 (1923) (This article is in three parts, 33 YALE L.J. 1, 141 & 285.). The current language of the North Carolina and Wisconsin acts relative to "color of title" departs much further from the original model than the language of the limitation acts of the other states listed above.

29. Burns v. Curran, 282 Ill. 476, 480, 118 N.E. 750, 752 (1918). *See also* Monroe v. Rawlings, 331 Mich. 49, 49 N.W.2d 55 (1951) (holding that actual possession was proved because, although the adverse claimants never improved, fenced, posted, or lived on the land, or attempted to keep others off, they made regular seasonal use of the land for hunting and fishing, maintained a small cabin for their guests, sold pulpwood from the land, sold part of the land to the county road commission, executed and recorded a number of oil leases, mortgages, and made conveyances of parts of the lands among themselves). *But see* McDonald v. Weinacht, 465 S.W.2d 136 (Tex. Civ. App. 1971) (holding that use for grazing animals, cutting timber, or harvesting natural crops, without more, cannot amount to adverse possession); Murray v. Bousquet, 154 Wash. 42, 280 P. 935 (1929) (same).

Generally, as to what constitutes "actual possession," see R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *supra* note 7, at § 11.7 at 758-59; 4 H. TIFFANY, *supra* note 7, at § 1138.

30. *See* R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *supra* note 7, at § 11.7 at 759-60. "Obviously the adverse possessor may not claim constructive possession over areas not described in the colorable instrument. There also must be some limit to how large a parcel may be constructively

tle," as well as the "actual" possession sufficient to give an adverse claimant the benefit of the "constructive" possession doctrine when he possesses under "color of title."[31] Absent a statutory definition of "color of title," courts generally define "color of title" as any "document that appears to give title but, for some reason not apparent on its face, does

possessed; presumably it would have to be reasonable in size [relative] to the area actually possessed." *Id.* at 760 (footnotes omitted).

As a general rule, "[m]ere assertions of ownership without taking and holding physical control over the property for the required period do not establish adverse possession." 3 AM. L. PROP., *supra* note 7, at § 15.3 at 768. However, some statutes provide that a person who, in good faith, has color of title to vacant land and pays the property taxes on the land, will acquire title thereto at the end of the statutory limitation period. *See, e.g.*, ILL. ANN. STAT. ch. 83, § 7 (Smith-Hurd 1966); WASH. REV. CODE § 7.28.080 (1961). Although these statutes do not require "adverse possession," they do provide for acquisition of title by persons with "color of title" who, in effect, assert their claim of ownership by payment of taxes on vacant land.

31. *See, e.g.*, N.Y. REAL PROP. ACTS. LAW § 511 (Consol. 1979) ("a written instrument, as being a conveyance of the premises in question, or . . . the decree or judgment of a competent court") & § 512 (first defining possession under "color of title" in the same terms used in § 522 to define possession without "color of title," and then adding cases where the land, "although not inclosed, . . . has been used for the supply of fuel or of fencing timber, either for the purposes of husbandry or for the ordinary use of the occupant"). Similar provisions are to be found in the limitations acts of many other states. *See supra* note 28.

Compare MICH. COMP. LAWS § 600.580 (1979), defining "color of title" to include "a devise in any will"; or any deed "made upon the sale of the premises by an executor, administrator, guardian, or testamentary trustee, or by a sheriff or other proper ministerial officer under the order, judgment, process, or decree of a court . . . of competent jurisdiction within this state, or by a sheriff upon a mortgage foreclosure sale," or "by an officer of this state or the United States who is authorized to make deeds upon the sale of lands for taxes assessed and levied within this state." "Color of title," when it consists of a deed of the kind described, is the basis for giving the adverse claimant the benefit of a shorter limitation period (5 or 10 years) instead of the general limitation period of 15 years. It is not clear whether documents not mentioned in the statute may constitute "color of title" for the purpose of establishing the adverse claimant's "constructive" possession of those parts of the land described in such a document which he did not actually possess.

In a number of states, a shorter statutory limitation period is provided only when the adverse claimant holds under "color of title" and, in addition, pays the real estate taxes on the land throughout that period. But payment of taxes is generally not required in order to give the claimant holding under "color of title" the benefit of the "constructive" adverse possession doctrine.

N.J. STAT. ANN. § 2A:14-31 (West 1952) provides that 30 years' actual possession of any real estate under "claim or color of title" shall be "a good and sufficient bar to all prior . . . claims whatever, . . . and shall vest an absolute right and title in the actual possessor of all such real estate." The relevant "color of title" is defined as "a proprietary right," based on a grant from the original New Jersey proprietors, "recorded in the office of the surveyor general . . . or the office of the secretary of statute." But this section appears to have little current relevance. Except for differences in the treatment of disabilities that may extend the limitation period, adverse possession for the required limitation period will produce the same legal result, even though the adverse possessor has no "color of title," under N.J. STAT. ANN. 2A:14-6 to 7 (West 1952) (20 years), or 2A:14-30 (West 1952) (30 years or, as to "woodlands or uncultivated tracts," 60 years). For a detailed treatment of the New Jersey limitation acts, see Braue v. Fleck, 23 N.J. 1, 127 A.2d 1 (1956).

not [do so]."[32] Thus "color of title" may consist of a void or defective deed executed by a private person or a public officer, a void will, or a void court judgment or decree.[33]

2. "Open and Notorious Possession"

The courts created the requirement that possession be "open and notorious" to safeguard the rights of the true owner against a claim of adverse possession of which he had no knowledge and which he could not have discovered through reasonable diligence in looking after his land.[34] However, as the definition of "actual" possession in the preceding paragraph of this article suggests, this requirement probably does no more than state one of the normal characteristics of actual possession of any area on the earth's surface. One could hardly imagine an "actual" possession of land that is not "open and notorious," since "a furtive, concealed use of the property at odd times is not the exercise of dominion and control such as characterizes the use and possession of the average owner in the enjoyment of his property."[35] Thus the requirement probably has independent significance only when title to an area beneath the surface of the land is claimed by adverse possession and there are no visible signs of such possession on the surface of the overlying land.[36]

3. "Hostile Possession"

Unless it is coupled with an additional "claim of right" requirement, "hostile" simply means wrongful, and states the obvious requirement

32. R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *supra* note 7, at § 11.7 at 759. For a fuller discussion, see 4 H. TIFFANY, *supra* note 7, at § 1155.

33. Even a quitclaim deed may constitute "color of title" if it purports to convey the land, but not if it merely releases whatever interest the grantor may have; and an unrecorded deed may constitute "color of title." But it is frequently held that a document void on its face cannot constitute "color of title." *See* 4 H. TIFFANY, *supra* note 7, at § 1155; 5 G. THOMPSON, *supra* note 15, at § 2550.

34. *See* H. TIFFANY, *supra* note 7, at § 1140. *Contra* 3 AM. L. PROP. *supra* note 7, at § 15.3 at 769 ("implication that there must be notoriety of possession so as to acquaint the owner thereof before the statute starts to run is quite untenable if possession in fact exists, because the owner has the right to maintain ejectment against such possessor, and the statute starts to run as soon as the cause of action accrues.").

35. 3 AM. L. PROP., *supra* note 7, at § 15.3 at 769. *Accord* 4 H. TIFFANY, § 1140 at 728 (noting that cases stating that notoriety of possession is unnecessary if the possession is known to the true owner "suggest, by implication, that there might be a possession sufficient to satisfy the requirement of actual possession, but not sufficient to satisfy that of visible and notorious possession.").

36. *See, e.g.*, Marengo Cave Co. v. Ross, 212 Ind. 624, 10 N.E.2d 917 (1937) (possession of cave not "open and notorious" and therefore not "adverse").

that the adverse claimant's possession must create a cause of action in the true owner for recovery of the possession of his land.[37] This means that the adverse claimant's possession must have been wrongful as against the true owner at its inception or, if not then wrongful, must have been made wrongful by the subsequent conduct of the parties. Courts often hold that certain legal relationships by their nature raise a presumption that the possessor of land holds "in subordination to" the rights of another—a presumption that only evidence of an unequivocal denial or repudiation of the other's rights can rebut.[38] Common examples are the possession of a tenant,[39] a trustee or agent,[40] a purchaser under an executory con-

37. Despite the mental image it conjures up, the term "hostile," as it is generally used in the law of adverse possession, does not mean that the adverse claimant must act in "bad faith"; "[i]t is not necessary that he intend to take away from the owner something which he knows to belong to another, or even that he be indifferent concerning the legal title." 7 R. POWELL, *supra* note 24, at 1013[2][c]. However, when a landowner wrongfully occupies a strip of his neighbor's land, a minority of the courts holds that his possession is not "hostile" if it results from an honest mistake as to the location of his boundary, rather than from a dishonest intent to appropriate his neighbor's land or indifference as to the true ownership of the strip. On the other hand, the term "hostile" obviously does not mean that the adverse claimant must have acted in "good faith," believing that he owned the land in question. The term is neutral with regard to the adverse claimant's bona fides.

38. 3 AM. L. PROP. *supra* note 7, § 15.4 at 773.

39. A tenant for years or from period to period is rightfully in possession and he cannot make his possession "hostile" (wrongful) without repudiating the landlord-tenant relationship on which his right to possession rests. Most of the adverse possession cases involve possession with the informal permission of the true owner. *See, e.g.*, United Hebrew Congregation v. Bolser, 244 Ky. 102, 50 S.W.2d 45 (1932) (adverse claimant permitted to have possession in return for a "small rental"); Hungerford v. Hungerford, 234 Md. 338, 199 A.2d 209 (1964) (adverse claimant in possession under unenforceable oral purchase contract); Martin v. Randona, 175 Mont. 321, 323, 573 P.2d 1156, 1158 (1978) (adverse claimants "were on the land . . . with the permission of" the true owners.). In all such cases the adverse claimant is a tenant at will, rightfully in possession unless and until the tenancy is terminated in some manner, including repudiation by either party.

In cases in which the true owner's attempt to transfer a fee simple estate is legally ineffective because of some defect in execution of the deed or because no written conveyance was executed, it can be argued that the intended grantee is only a tenant at will when he takes possession. But the prevailing view is that he is an adverse possessor because he holds under a "claim of right" inconsistent with the grantor's title—a "claim of right" recognized and acquiesced in by the grantor, who intended to transfer his entire estate to the adverse claimant. *See* 2 AM. L. PROP., *supra* note 7, at § 15.6 n.2. *See, e.g.*, Vandiveer v. Stickney, 75 Ala. 225 (1883); Nevells v. Carter, 122 Me. 81, 119 A. 62 (1922) (intended grantee was adverse possessor although true owner continued in actual possession, because the latter became the tenant of the former).

In some cases it is proper to infer the true owner's permission for the adverse claimant's possession, *e.g.*, when it is customary for landowners to allow others to make limited use of vacant, unimproved land, subject to a tacit understanding that such use is not "hostile" (wrongful) as against the owner. Many of the cases stating that a "mere squatter" cannot acquire title by adverse possession can be explained either on this ground, *see, e.g.*, Northern Pac. Ry. v. Devine, 53 Wash. 241, 101 P. 841 (1909), or on the ground that the limited use by the "squatter" did not amount to possession.

40. *See, e.g.*, Meacham v. Bunting, 156 Ill. 586, 41 N.E. 175 (1895) (trustee); Terry v. Daven-

tract,[41] a mortgagor or mortgagee,[42] an occupying co-tenant who has not "excluded" or "ousted" his or her non-occupying co-tenants,[43] and a grantor after delivery of a deed to his grantee.[44] However, except perhaps for the last relationship, it is clear that the possessor is rightfully in possession and that the other party has no cause of action for recovery of possession. Thus, it is not really necessary to invoke any "presumption"

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port, 185 Ind. 561, 112 N.E. 998 (1916) (same); Leigh v. Howard, 87 N.J.L. 113, 93 A. 680 (Sup. Ct. 1915) (president of corporation termed a "trustee"). Presumably other fiduciary relationships will have the same effect.

41. *See, e.g.,* Patterson v. Johnson, 225 Ala. 401, 143 So. 560 (1932); Johnson v. Hume, 163 Ga. 867, 137 S.E. 56 (1927) (per curiam); Rains v. Louisville & N. R.R., 254 Ky. 794, 72 S.W.2d 482 (1934); Hogan v. Egyptian Portland Cement Co., 257 Mich. 381, 241 N.W. 129 (1932). Assuming that the contract is enforceable, the purchaser is said to be an equitable owner in possession, but is actually some kind of tenant because his right to possession lasts only so long as he continues his performance of the contract.

42. *See, e.g.,* Warder v. Enslen, 73 Cal. 291, 14 P. 874 (1887) (mortgagee's possession not adverse prior to refusal of mortgagor's offer to redeem); Holmes v. Turner's Falls Co., 150 Mass. 535, 23 N.E. 305 (1890) (mortgagor's possession not adverse to mortgagee). After the mortgagor's default (but rarely before default), the mortgagee may obtain possession of the land with the mortgagor's consent, or peaceably although without the mortgagor's consent. In either case, the mortgagee's possession is rightful and he holds as a quasi-trustee subject to a duty to account for all rents and profits obtained while he is in possession and to maintain the mortgaged property. This is true under the "lien" as well as under the "title" and "hybrid" theories of the mortgage. *See* G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW §§ 4.27-.28, 4.30-.33 (2d ed. 1985).

43. *See, e.g.,* Johnson v. James, 237 Ark. 900, 903, 377 S.W.2d 44, 47 (1964) (possession of less than all "is presumed to be possession by all cotenants"); Spangler v. Schaus, 106 R.I. 795, 264 A.2d 161 (1970) (same—cotenants of an easement); Holbrook v. Carter, 19 Utah 2d 288, 431 P.2d 123 (1967) (same). *See also* Dunlop v. Twin Beach Park Ass'n, 111 Mich. App. 261, 314 N.W.2d 578 (1981). Cotenants have an "equal" and "concurrent" right to possession, but the failure of one or more cotenants to exercise this right does not make the possession of other cotenants tortious.

Professor Helmholz's argument that "more cases found in the reports of the years surveyed have held in favor of the acquisition of title by an adversely possessing cotenant than is consistent with the conclusiveness of the rule" that his possession is not "adverse" unless he has "ousted" or "excluded" the other cotenants, see *Adverse Possession, supra* note 1, at 354, is examined infra in the text accompanying notes 205-29.

44. In such cases, a strong presumption exists that the grantor's possession is subordinate to the grantee's title. *See, e.g.,* Daniel v. Williams, 177 Ala. 140, 58 So. 419 (1912); Lay v. Whelchel, 78 Ga. 786, 3 S.E. 906 (1887); Rowe v. Beckett, 30 Ind. 154 (1868); Iowa Cent. Ry. v. Homan, 151 Iowa 404, 131 N.W. 878 (1911); Sellers v. Crossan, 52 Kan. 570, 35 P. 205 (1894); Nugent v. Peterman, 137 Mich. 646, 100 N.W. 895 (1904); Jackson v. Burton, 1 Wend. 341 (N.Y. 1928); Gardner v. Wright, 59 Or. 609, 91 P. 286 (1907); Pierce v. Barney, 209 Pa. 132, 58 A. 152 (1904).

It is sometimes said that this presumption is based on the grantee's tacit permission for the grantor to remain in possession until the grantee is ready to take possession, but it is probably based mainly on the strong policy against allowing the grantor to "derogate from his grant" by asserting an adverse claim against his own grantee. Cases holding that the passage of time may overcome the presumption are consistent with the tacit permission theory; but cases like Jackson v. Burton, 1 Wend. 341 (N.Y. 1928), holding that a grantor's possession was not "adverse" although continued for 27 years, are obviously based on the policy stated above.

that the possessor holds "in subordination to" the title of the other party.[45]

4. "Exclusive Possession"

The requirement that the adverse claimant's possession be "exclusive" merely states a necessary factual basis for concluding that the adverse claimant's possession was wrongful ("hostile") as against the true owner. This requirement does not mean that the adverse claimant must in all cases have been in sole possession of the land, only that he must not have shared possession with the owner.[46]

5. "Continuous Possession"

The "continuous" possession requirement simply assures that the true owner has had a cause of action to recover possession of his land for the full statutory period of limitation.[47] This requirement has meaning only if the time of accrual of the true owner's cause of action can be fixed.

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45. At least 10 states have a statutory presumption that any person other than the true owner holds "in subordination to" the title of the true owner. These states are California, Florida, Idaho, Montana, Nevada, North Dakota, South Carolina, South Dakota, Utah, and Wisconsin. *See, e.g.*, CAL. CIV. PROC. CODE § 321 (Deering 1972), which provides as follows:

> [I]n every action for the recovery of real property . . . the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title, for five years before the commencement of the action.

This and similar provisions in the other states can be traced to the New York Revised Statutes of 1828. *See infra* notes 50-51. *See also supra* note 28.

46. That adverse possession must be "exclusive" means that it must not be shared with the disseised owner. Two or more persons may be coadverse possessors; if they acquire title, it will be as tenants in common. One may be in adverse possession through another whom he has put in possession as a tenant. . . . Of course an adverse possessor may be in exclusive possession of part of a parcel of land and the owner in possession of another part; that is equally so in mistaken boundary cases.

R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *supra* note 7, § 11.7, at 762-63. *Accord* 7 R. POWELL, *supra* note 24, at 1013[2][d]; 4 H. TIFFANY, *supra* note 7, at § 1141. Broad statements that the adverse claimant's possession must be "exclusive of all others" are clearly wrong because, as indicated above, there may be several concurrent adverse possessors. However, if two or more persons acting independently rather than concurrently seek to establish possession of the same land at the same time, their conduct should be viewed as a series of trespasses rather than as establishing "possession."

47. "Continuity" of possession may be preserved when one adverse possessor transfers possession to another adverse possessor inter vivos or there is a transfer pursuant to a testamentary disposition or by inheritance. In such cases, "privity" is said to exist between the successive adverse possessors, and their successive periods of possession may be "tacked" (added) together to satisfy the time required by the applicable statute of limitations. *See* R. CUNNINGHAM, W. STOEBUCK & D.

Abandonment of possession by the adverse claimant or his ouster by the true owner or by some third party prior to expiration of the statutory limitation period will necessarily terminate the true owner's cause of action to recover possession. Any subsequent repossession of the land by the adverse claimant will create a new cause of action in the true owner and cause a new limitation period to begin to run.[48]

II. "SUBJECTIVE INTENT" AND "CLAIM OF RIGHT"

In addition to requiring that the adverse claimant's possession must be "hostile", many courts also require that the possession be under a "claim of title" or "claim of right." This requirement originated in a series of early nineteenth-century New York cases which held that the possession of any person other than the true owner of land was presumed to be "in subordination to" the title of the true owner, and that this presumption could be overcome only by proof that the adverse claimant was asserting a "claim of title" or "claim of right" inconsistent with the true owner's title.[49] The New York Revised Statutes of 1828 incorporated the "claim of title" requirement[50] whence it passed into the statutory law of at least ten other states.[51] "But more important than the influence of the New

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WHITMAN, *supra* note 7, § 11.7 at 763-64; 3 AM. L. PROP., *supra* note 7, at § 15.10; 4 H. TIFFANY, *supra* note 7, at § 1146.

48. *See* 3 AM. L. PROP., *supra* note 7, at § 15.9; 7 R. POWELL, *supra* note 24, at 1013[2][e]; 5 G. THOMPSON, *supra* note 15, at § 2551; 4 H. TIFFANY, *supra* note 7, at § 1145.

49. For a discussion of the New York cases, see Bordwell, *supra* note 28, at 148-49. Various courts have used the terms "claim of title," "claim of right," and "claim of ownership" to express the same requirement. The early New York cases generally used the term "claim of title."

50. *See* Bordwell, *supra* note 28, at 149 nn.177 & 178. The New York Revised Statutes of 1828 provisions as to adverse possession employed the term "claim of title," as have all subsequent New York statutory revisions including the current one. *See* N.Y. REAL PROP. ACTS. LAW §§ 511, 521 (Consol. 1979) ("claim of title"). *See also id.* at §§ 512, 522 ("a person claiming title"). Sections 511 and 512 define adverse possession when the claimant has both "color of title" and "claim of title". Sections 521 and 522 define adverse possession when the claimant has only "claim of title." The Revised Statutes of 1828 apparently codified the presumption of "subordinate" holding, but it is omitted in the current New York limitation act.

51. *See* Bordwell, *supra* note 28, at 149 n.17 (listing California, Florida, Idaho, Montana, Nevada, North Dakota, South Carolina, South Dakota, Utah, and Wisconsin). The limitation acts of all these states incorporate both the presumption of "subordinate" holding and the "claim of title" requirement. CAL. CIV. PROC. CODE § 321 (Deering 1972) gives the legal titleholder the benefit of the presumption "unless it appears that the property has been held and possessed adversely to such legal title, for five years before the commencement of the action". Sections 322 and 324 provide that land "is deemed to have been held adversely" when possession was begun and has continued for the 5-year limitation period "under claim of title, exclusive of [any] other right". Sections 323 and 325, respectively, define "adverse" possession when the adverse claimant does, or does not, have "color of title."

York cases on the statutory law has been their influence on the law of the courts, for the early New York cases "were cited everywhere and were recognized as having the greatest authority."[52]

Although a few American courts rejected the "claim of right" requirement for adverse possession,[53] the great majority adopted the requirement,[54] together with the associated presumption of "subordination."[55] But that presumption is, in fact, merely a way of stating that the ultimate burden of proving that title has been acquired by adverse possession rests on the adverse claimant.[56] Once the adverse claimant has introduced evidence of his actual wrongful possession for the statutory limitation period, the burden of producing evidence to rebut the adverse claimant's case shifts to the holder of the paper title.[57] And the "claim of right" requirement, although it may cause trouble in certain special situations,[58] has little practical significance in ordinary adverse possession cases. The

52. Bordwell, *supra* note 28, at 149. This article will hereinafter use the term "claim of right" because that is the term Professor Helmholz used in *Adverse Possession, supra* note 1. The rationale of the "claim of right" requirement is not clear. The assertion that "adverse possession" was the equivalent of "disseisin," and that "disseisin" required a "claim of right," is clearly inaccurate. *See* Bordwell, *supra* note 28, at 141, *citing* COKE, LITTLETON, *181a; Bracton, fol. 161 b; ROLLE, ABRIDGEMENT 659; 2 PRESTON, ABSTRACTS OF TITLE 292 (2d ed. 1824). *Accord* 4 H. TIFFANY, *supra* note 7, § 1147.

53. *See* Bryan v. Atwater, 5 Day 181 (Conn. 1811). The Supreme Court of Connecticut stated:

> To make a disseisin, it is not necessary that the disseizor should claim title to the lands taken by him. It is not necessary that he should deny or disclaim the title of the legal proprietor. No; it is necessary only that he should enter into, and take possession of, the lands, as if they were his own.

Id. at 188.

54. *See* 2 AM. L. PROP., *supra* note 7, at § 15.4; 4 H. TIFFANY, *supra* note 7, at § 1147; A. SEDGWICK & F. WAIT, *supra* note 8, at §§ 754-56.

55. *See* 4 H. TIFFANY, *supra* note 7, at § 1144 nn.8-9; 2A C.J.S. *Adverse Possession* § 269 nn.16-17, § 270 n.37.

56. 4 H. TIFFANY, *supra* note 7, at § 1144 nn.4-7.

The adverse claimant may be the defendant in an action to recover possession by the holder of the paper title, in which case the plaintiff must "recover upon the strength of his own title." But in such cases the plaintiff satisfies his initial burden of producing evidence by showing his paper title, and both the burden of introducing evidence that the plaintiff's title was extinguished by adverse possession for the statutory limitation period and the burden of persuading the trier of fact on this point shift to the defendant.

In many cases, however, the plaintiff in an action to quiet title or to recover possession of land may rely on acquisition of title by adverse possession to establish his right to judicial relief. In such cases, the plaintiff has the burden of both producing evidence in support of his claim, and persuading the trier of fact that his claim is valid.

See 7 R. POWELL, *supra* note 24, at 1018.

57. 4 H. TIFFANY, *supra* note 7, at § 144 nn.11-120.

58. The "claim of right" requirement has been most troublesome in cases in which the adverse claimant claims to own an estate less than a fee simple, derived either from the true owner or from

courts agree (1) that "claim of right" means only a manifested "intention to appropriate and hold the land as owner, to the exclusion, rightfully or wrongfully, of every one else;"[59] (2) that this intention need not be manifested by any express oral declaration but "may be generally evidenced by the character of his [the adverse claimant's] possession and acts of ownership;"[60] and (3) that if these acts are "sufficiently definite, open and exclusive, it will be presumed that they are done with the intent to appropriate the land."[61] Thus those "acts of ownership" required to establish the adverse claimant's "actual, open, notorious, hostile, and exclusive" possession of the land will also be sufficient to create a rebuttable presumption that the adverse claimant has a "claim of right."[62]

Even if the adverse claimant's possession at its inception is such as to

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someone else, and in the "mistaken boundary" cases discussed in part III of this article. *See infra* notes 87-98 and accompanying text.

59. A. SEDGWICK & F. WAIT, *supra* note 8, at § 756. This statement appears verbatim (with or without quotation marks) or in substance in many judicial opinions. *See, e.g.,* Higginbotham v. Kuehn, 102 Ariz. 37, 38, 424 P.2d 165, 166 (1967); McCurdy v. Rich, 76 Ind. App. 469, 471, 132 N.E. 315, 316 (1921); Fear v. Barwise, 9 Kan. 131, 136, 143 P. 505, 507 (1914); Bond v. O'Gara, 177 Mass. 139, 143-44, 58 N.E. 275, 276 (1900); Carpenter v. Coles, 75 Minn. 9, 11, 77 N.W. 424, 424 (1898); Morrison v. Linn, 50 Mont. 396, 402, 147 P. 166, 168 (1915); Weiss v. Meyer, 208 Neb. 429, 432, 303 N.W.2d 765, 768 (1981); Caywood v. January, 455 P.2d 49, 50 (Okl. 1969); Bessler v. Powder River Gold Dredging Co., 95 Ore. 271, 279, 185 P. 753, 756 (1919); Houston Oil Co. v. Brown, 202 S.W. 102, 108 (Tex. Civ. App. 1917), *cert. denied,* 250 U.S. 659 (1919). It should be noted that in most of these cases the court expressly said that the "claim of right" need not be asserted in "good faith."

60. A. SEDGWICK & F. WAIT, *supra* note 8, at § 758.

> Conceding the necessity of a showing by the person in possession of a claim of right or title on his part, such claim may no doubt be shown by evidence of declarations by the possessor, or by those of the persons through whom he claims title, but ordinarily . . . it is to be inferred from the fact that the possessor's entry was under color of title, or from the doing of acts by the possessor during his possession such as ordinarily only an owner would do, such as the construction of buildings and making of improvements, fencing and use of fenced lands, the payment of taxes.

4 H. TIFFANY, *supra* note 7, at § 1148 (citing numerous cases).

See also Hauer v. Van Straaten Chem. Co., 415 Ill. 268, 273, 112 N.E.2d 623, 625 (1953) ("It is enough that the claimant prove he so acted that it showed he claimed title. Using and controlling property as an owner is the ordinary mode of asserting a claim of title, and it is the only way a claim of title could be proved in many cases.").

61. A SEDGWICK & F. WAIT, *supra* note 8, at 758. *See also* 2A C.J.S. *Adverse Possession* § 270 at nn.41-43; *id.* § 271 at nn.52-60. To the same effect, though not cited in C.J.S., is Zuanich v. Quero, 135 Vt. 322, 325, 376 A.2d 763, 765 (1977) ("Absent evidence of permission, open and notorious use for the statutorily prescribed period of time gives rise to a prima facie claim of right.").

62. *See* 3 AM. L. PROP. *supra* note 7, § 15.4 at 776-78; 4 H. TIFFANY, *supra* note 7, at § 1148 text accompanying n.8. In many cases, the courts treat the evidence as to the adverse claimant's "acts of ownership" as establishing both that he acquired "actual" possession of the land, and that his possession was "adverse." *See, e.g.,* Monroe v. Rawlings, 331 Mich. 49, 49 N.W.2d 55 (1951).

create a presumption that the adverse claimant has a "claim of right," the presumption can be rebutted by proof that the adverse claimant later became the true owner's tenant[63] or contracted to buy the land from the true owner[64] before the expiration of the statutory limitation period. In either case, the adverse claimant's possession would become "permissive" rather than "adverse" and the true owner's cause of action against the adverse claimant would terminate. Proof that the adverse claimant in some manner indicated to the true owner that his possession was not under any "claim of right" would also rebut the presumption arising from the adverse claimant's original "owner-like" conduct in taking and holding possession. The adverse claimant, for example, might have (1) made an offer to lease the land[65] or to purchase it[66] from the true

63. *See, e.g.*, Ayers v. Day & Night Fuel Co., 451 P.2d 579 (Alaska 1969) (adverse claimant paid $200 as rent); Abbey Homestead Ass'n v. Willard, 48 Cal. 614 (1874); Chicago & Alton R.R. v. Keegan, 185 Ill. 70, 56 N.E. 1088 (1900); Frazier v. Banks, 294 Ky. 61, 170 S.W.2d 900 (1943); Woods v. Garrard, 282 Ky. 233, 138 S.W.2d 325 (1940); Houghton County v. Massie, 215 Mich. 654, 184 N.W. 446 (1921); Campau v. Lafferty, 50 Mich. 114, 15 N.W. 40 (1883); Campau v. Lafferty, 43 Mich. 429, 5 N.W. 648 (1880); Olson v. Burk, 94 Minn. 456, 103 N.W. 335 (1905); Northern Pac. Ry. v. George, 51 Wash. 303, 98 P. 1126 (1908). A formal lease made the adverse claimant's possession rightful in all the cited cases except *Ayers*. In *Ayers* there was no lease and the adverse claimant became a tenant at will. No doubt the true owner, on discovering someone wrongfully in possession of his land, normally insists on execution of a formal lease if he decides not to evict the wrongful possessor.

Acceptance of a deed from the true owner conveying a life estate to him would seem to make the adverse claimant's possession rightful because his subsequent possession would be consistent with his rights as life tenant.

If the true owner makes a legally effective conveyance of a fee simple estate to the adverse claimant, the full ownership of the land is transferred and the adverse claimant's possession thereafter is rightful as against the world. If the intended conveyance is not legally effective because of some defect in the deed, or because no written instrument was executed, the prevailing view is that the intended grantee is an adverse possessor rather than a tenant at will. *See supra* note 39.

64. Hungerford v. Hungerford, 234 Md. 338, 199 A.2d 209 (1964) (adverse claimants were in possession under an unenforceable oral contract with true owner, and made repeated requests for a deed conveying legal title to them); Central Pac. Ry. v. Torpey, 51 Utah 107, 168 P. 554 (1917) (adverse claimant sought to obtain specific performance of contract).

A purchaser in possession under an unenforceable contract is, for most purposes, both an "equitable" owner and a tenant with the right to remain in possession so long as he does not default in performance of the purchase contract; thus he would appear to be a tenant at will.

65. *See, e.g.*, Risher v. Madsen, 94 Neb. 72, 142 N.W. 700 (1913); Horton v. Davidson, 135 Pa. 186, 19 A. 934 (1890). Tiffany states that "[a] mere offer to take a lease would seem also to be strong evidence of recognition of the other's title, even if not conclusive in that regard." 4 H. TIFFANY, *supra* note 7, at §§ 1166.

66. Davis v. Mayweather, 255 Ark. 966, 504 S.W.2d 741 (1974); Central Pac. R.R. v. Mead, 63 Cal. 112 (1883); Lovell v. Frost, 44 Cal. 471 (1872); Calkins v. Kousouros, 72 Idaho 150, 237 P.2d 1053 (1951); Montgomery County v. Case, 212 Iowa 73, 232 N.W. 150 (1931); Litchfield v. Sewell, 97 Iowa 247, 66 N.W. 104 (1896); Munroe v. Pere Marquette Ry., 226 Mich. 158, 197 N.W. 566

owner; or (2) brought an action to condemn the land;[67] or (3) acknowledged the superior title of the true owner in some other way, by either a direct statement to him or a statement to a third party who later communicated it to the true owner.[68]

(1924); Dunlop v. Twin Beach Park Ass'n, 111 Mich. App. 261, 314 N.W.2d 578 (1981); Taranto v. People's Bank of Biloxi, 242 Miss. 607, 136 So. 2d 213 (1962); Brylinski v. Cooper, 95 N.M. 580, 624 P.2d 522 (1981); Beaver v. Davis, 275 Or. 209, 550 P.2d 428 (1976); Truman v. Raybuck, 207 Pa. 357, 56 A. 944 (1904); Headerick v. Fritts, 93 Tenn. 270, 24 S.W. 11 (1893); Bitonti v. Kauffeld Co., 94 W. Va. 752, 120 S.E. 908 (1923); State v. Vanderkoppel, 45 Wyo. 432, 19 P.2d 955 (1933).

In most of these cases the courts were careful to point out that the presumption can be overcome only by an "offer to purchase . . . the *property*, and not merely to purchase an outstanding or adverse claim or title to quiet his possession or protect himself from litigation." Lovell v. Frost, 44 Cal. at 474. Some of these cases hold as well as say that the latter does not amount to a disclaimer, *e.g.*, Baley v. Bond, 237 Ala. 59, 185 So. 411 (1938); Headerick v. Fritts, 93 Tenn. 270, 24 S.W. 11 (1893); Bitonti v. Kauffeld, 94 W.Va. 752, 120 S.E. 908 (1923); Glithero v. Fenner, 122 Wis. 356, 99 N.W. 1027 (1904).

In the cases cited above, the courts seem to have thought that a real "offer to purchase the property" amounts to a "disclaimer" of any "claim of right" as a matter of law. *But cf.* Montgomery County v. Case, 212 Iowa 73, 232 N.W. 150 (1931) (offer of $200 is only some evidence of a disclaimer, but is not conclusive); Walbrunn v. Ballen, 68 Mo. 164 (1878) (offer to buy is only evidence of disclaimer to be considered by the jury).

67. Nebraska Ry. v. Culver, 35 Neb. 143, 52 N.W. 886 (1892).

68. *See, e.g.*, Gurganus v. Kiker, 286 Ala. 442, 241 So. 2d 113 (1970) (adverse claimant agreed to "have an abstract run" and that the party shown by the abstract to have the "better paper title" should be recognized as the true owner); Vittitow v. Burnett, 112 Ark. 277, 165 S.W. 625 (1914); Tidwell v. Waldrup, 347 Mo. 1028, 151 S.W.2d 1092 (1941); Weisel v. Hobbs, 138 Neb. 656, 294 N.W. 448 (1940); Tindle v. Linville, 512 P.2d 176 (Okla. 1973); Robinson v. Leverenz, 185 Or. 262, 202 P.2d 517 (1949); Farmers' & Mechanics' Bank v. Wilson, 10 Watts 261 (Pa. 1840); Ingersoll v. Lewis, 11 Pa. 212, 51 Am. Dec. 536 (1849); Patterson v. Reigle, 4 Pa. 201, 45 Am. Dec. 684 (1846); Butler v. Hanson, 455 S.W.2d 942 (Tex. 1970).

In *Gurganus v. Kiker*, there is an apparent alternative holding based on the plaintiff's testimony that defendant was not in possession during the 5 years before the ejectment action was begun. The court said that the 10-year statute of limitations "does not apply unless defendant was in adverse possession during the whole of the ten-year period next preceding the commencement of the action," despite the fact that "the statutory period of ten years" had seemingly *expired* some 10 years before the action was begun. 286 Ala. at 448-49, 241 So. 2d at 119. This novel doctrine would obviously require an adverse possessor either to "keep his flag" flying forever or to bring a suit to quiet title promptly upon expiration of the statutory period. But it seems probable that the date "which ended the statutory period of ten years" after the adverse possession began, was February 21, *1967* and not February 21, *1957* as the court stated. *Id.* at 444, 241 So. 2d at 115. If so, the ejectment action was begun shortly after the 10-year period following the inception of the defendant's adverse possession expired, and defendant's failure to prove more than 5 years of actual adverse possession after its inception would require the court's holding that he had failed to prove title by adverse possession.

In *Bank v. Wilson*, the court said that the acknowledgment of the true owner's title must not only be "express," but also must be joined with "a distinct agreement to leave the land or continue as tenant." 10 Watts at *262*. In *Patterson v. Reigle* and *Ingersoll v. Lewis*, however, the Pennsylvania court did not insist on this additional requirement; and in *Ingersoll*, the acknowledgement was not really "express," though it was inferable from a phrase in a written contract by which the adverse

Many of the judicial opinions holding that an adverse claimant's wrongful possession for the statutory period did not extinguish the true owner's title because the claimant's later conduct overcame the usual presumption that he had a "claim of right" contain no satisfactory rationale. Indeed, some of the opinions are both confused and confusing.[69] In one case, for example, the court said that, absent a "claim of right," the adverse claimant's "occupancy" was "subservient to the paramount title" rather than "adverse" to it, and that there was therefore "nothing more than a mere trespass" which, "no matter how long continued, can never ripen into good title."[70] But this statement is nonsensical. If "subservient to the paramount title" means that the possession was "permissive," the possession was rightful and could not even amount to a "trespass." On the other hand, if "occupancy" means "possession," "occupancy" would amount to more than a mere "trespass." But if there was really nothing more than a "trespass" not amounting to "possession," the true owner had a cause of action for damages rather than for recovery of possession, in which case the presence or absence of a "claim of right" is quite irrelevant.[71]

As some courts have recognized, the best explanation of the results in most of the "disclaimer" cases is that "the possessor estops himself from asserting the statute by assertions brought home to the owner directly or indirectly that he occupies in recognition of the owner's title, and this induces him [the owner] not to take action to recover the property."[72] Concededly, however, this estoppel theory fails to explain the occasional judicial statement that recognition of the true owner's superior right,

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possessor agreed to buy land other than the land he adversely possessed. 11 Pa. at 220, 51 Am. Dec. at 544.

Other courts have held that the acknowledgement or admission of the true owner's title may be inferred from conduct other than an express statement. *See, e.g.*, McCoy v. Kentucky & W. Va. Gas Co., 312 Ky. 57, 226 S.W.2d 515 (1950) (negotiation of mineral lease to third party by adverse claimant on behalf of record owner, to whom royalties were to be paid).

Cf. McAllister v. Hartzell, 60 Ohio St. 69, 5 N.E. 715 (1899) (admission, in true owner's presence, that adverse claimant did not own the land was not sufficient to suspend the running of the statutory limitation period).

69. This is especially true of the opinions of the Texas Court of Civil Appeals, which form a disproportionately large portion of the cases Professor Helmholz surveyed.

70. Hensz v. Linnstaedt, 501 S.W.2d 463, 465 (Tex. Civ. App. 1973).

71. *See supra* text accompanying notes 26 & 27.

72. 3 AM. L. PROP. *supra* note 7, § 15.4, at 775 & § 15.9, at 811. The early Pennsylvania adverse possession cases clearly adopted the estoppel theory. *See* Farmers' & Mechanics' Bank v. Wilson, 10 Watts 261 (Pa. 1840); Ingersoll v. Lewis, 11 Pa. 212, 51 Am. Dec. 536 (1849); and Patterson v. Reigle, 4 Pa. 201, 45 Am. Dec. 684 (1846).

even after the adverse claimant has been in possession for a period in excess of the statutory limitation period, will be admissible in evidence to show that his possession was not under "claim of right,"[73] or the occasional intimation that a "disclaimer" not shown to have been brought home to the true owner may nevertheless preclude the adverse claimant's acquisition of title.[74] Such statements indicate that a few courts take seriously the notion that an adverse claimant must have a subjective "claim of right," although they do not explain how lack of such a "claim of right" can make the adverse claimant's possession rightful so that the statutory limitation period will not run against the true owner.

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73. *See* Sanders v. Baker, 217 Ark. 521, 624-25, 231 S.W.2d 106, 108 (1950); Bruni v. Vidaurri, 140 Tex. 138, 150, 166 S.W.2d 81, 92 (1942); McDonald v. Batson, 501 S.W.2d 449, 451 (Tex. Civ. App. 1973). *See also* Hensz v. Linnstaedt, 501 S.W.2d at 465 (adverse claimant, in deposition made while quiet title action was pending, "admitted that there was no appropriation of the land commenced and continued under a claim of right inconsistent with and hostile to the claim of the true owner" until about one year before the action was begun; this precluded acquisition of title by adverse possession as a matter of law).

Judicial assertions that statements made by the adverse claimant after he has been in possession for the statutory limitation period are admissible to show he did not hold under "claim of title" during the alleged period of adverse possession, are often coupled with the statement that "where title by limitation has become vested in the adverse claimant, a mere recognition of some other title does not revest the title acquired by adverse possession." Shirey v. Whitlow, 80 Ark. 444, 446, 97 S.W. 444, 445 (1906). *Accord* Butler v. Hanson, 455 S.W.2d 942, 946 (Tex. 1970). It is not clear whether the phrase "some other title" refers to the title the former true owner held.

74. *See* Reeves v. Metropolitan Trust Co., 254 Ark. 1002, 1003, 498 S.W.2d 2, 3 (1973). *See also* Dillaha v. Temple, 590 S.W.2d 331 (Ark. App. 1973). The Arkansas court stated "there was testimony at trial which indicated that" the adverse claimant "had once told his son that he recognized some interest of" the true owner "in the disputed property." *Id.* at 332. But the court did not make clear the significance of this "disclaimer." Later in the opinion, the court stated that the adverse claimant "in telephone conversation" with the true owner "had reaffirmed that they would work out their boundary line," which "evidence again indicate[d] a lack of hostile intent." *Id.* at 333. This statement to the true owner might well provide an adequate basis to estop the adverse claimant from subsequently asserting that his possession was "hostile."

In Patterson v. Reigle, 4 Pa. 201, 45 Am. Dec. 684 (1846), the court said, "It has been determined that one already in possession estops himself by declarations of submission addressed to the owner, and it would seem that he might do so by a general declaration explanatory of the nature of his entry." *Id.* at 204, 45 Am. Dec. at 685. It is not clear what the court meant by the second clause in the quoted sentence. There was no evidence in *Patterson* that the adverse claimant's "general declarations," to the effect that they "totally disclaimed holding any interest in the land whatever" and had only settled the land "to buy it, or get pay for the improvements" if the true owner should ever appear, were brought to the attention of the true owner, whose identity was not known to the adverse claimants. *Id.* at 202, 45 Am. Dec. at 683. Perhaps the court assumed that such general declarations would be brought home to the true owner in some way. In any event, the court held that the possession of the adverse claimants was to be presumed "adverse" and under "claim of right" in the absence of an express declaration that "they meant *not* to acquire title . . . for themselves" under the statute of limitation. *Id.* at 204, 45 Am. Dec. at 685 (emphasis added).

III. The Relevance of an Adverse Claimant's Good Faith or Bad Faith

Regardless of the operational significance of the "claim of right" requirement in adverse possession cases, the older cases are practically unanimous in holding that the "claim of right" is equally efficacious whether it is asserted in "good faith" or "bad faith."[75] Professor Helmholz concedes that the recent cases he surveyed, "taken as a whole, do not show that the adverse claimant must plead and prove that he acted in good faith,"[76] but he asserts that "[t]he cases do clearly show that the trespasser [sic] who knows that he is trespassing stands lower in the eyes of the law, and is less likely to acquire title by adverse possession than the trespasser who acts in an honest belief that he is simply occupying what is his already."[77] This article will therefore undertake an analysis of the cases cited by Professor Helmholz in support of his conclusion as to the legal significance of an adverse claimant's "good faith" or "bad faith."

A. Possession Under Color of Title

"Honest possession" is obviously relevant—indeed, essential—when

75. "Good faith" was required in Livingston v. Peru Iron Co., 9 Wend. 511 (N.Y. 1832), but the "good faith" requirement was definitely repudiated in Humbert v. Trinity Church, 24 Wend. 587, 610 (N.Y. 1840). Cases in accord with *Humbert* include, *e.g.*, Smith v. Roberts, 62 Ala. 83 (1878); May v. Dobbins, 166 Ind. 331, 77 N.E. 353 (1906); Warren v. Bowdran, 156 Mass. 280, 31 N.E. 300 (1892); Smith v. Feneley, 240 Mich. 439, 215 N.W. 353 (1927); Foulke v. Bond, 41 N.J.L. 527 (Err. & App. 1879); Patterson v. Reigle, 4 Pa. 201, 45 Am. Dec. 684 (1846); Lattie-Morrison v. Holladay, 27 Or. 175, 39 P. 1100 (1895); Jones v. Lemon, 26 W. Va. 629 (1885); Ovig v. Morrison, 142 Wis. 243, 125 N.W. 449 (1910). The classic statement is that an adverse claimant, "entering to gain a title though, conscious that he is a wrongdoer, will accomplish his object if, the owner do [sic] not enter or prosecute his claim within the prescribe period." *Patterson*, 4 Pa. at 204, 45 Am. Dec. at 685. *See also* Smith v. Roberts, 62 Ala. at 86 ("Adverse possession, open, notorious, accompanied with acts of ownership, or claim of ownership, bars an action for the recovery of lands, without any reference to the *bona fides*, or color of title, under which the adverse holder claims ownership. It is the *actual* claim of ownership, not the *bona fides* which is the test.").

Contra Goulding v. Shonquist, 159 Iowa 647, 141 N.W. 24 (1913); Ramsey v. Wilson, 52 Wash. 111, 100 P. 177 (1909) (seemingly holding that "good faith" is required for possession to ripen into title under the 10-year limitation act, which does not require "color of title"). But *Ramsey* appears to have been overruled *sub silentio* by State v. Stockdale, 34 Wash. 2d 857, 210 P.2d 686 (1949), and Bowden-Gazzam Co. v. Hogan, 22 Wash. 2d 27, 154 P.2d 285 (1944). In both *Stockdale* and *Hogan*, the court actually held that "bad faith" claimants had acquired title by adverse possession. For a discussion of the Washington cases, see Stoebuck, *The Law of Adverse Possession in Washington*, 35 WASH. L. REV. 53, 83-84 (1960). Subsequent Washington cases have continued to state the "good faith" requirement, but none of them involved any issue as to "good faith" or "bad faith."

76. *Adverse Possession, supra* note 1, at 332.

77. *Id.*

an adverse claimant holds under "color of title" and either seeks the benefit of a shorter limitation period or the benefit of constructive possession beyond the bounds of his actual possession[78] under a "color of title" limitation statute, that expressly imposes a "good faith" requirement.[79] Under these statutes, if the adverse claimant knows that the document of title upon which he relies as constituting his "color of title" is a nullity when he takes possession, the courts will deny him the benefit of a shorter limitation period and/or the "constructive possession" doctrine. Moreover, some courts have held that only an adverse claimant who takes possession in "good faith" can obtain the benefits of "color of title" even when the statute itself imposes no "good faith" requirement[80]—presumably because these courts, on policy grounds, do not wish to allow an adverse claimant to obtain any special benefit from showing he held under "color of title" unless, in fact, he honestly relied upon the docu-

78. Many statutes expressly provide for a shorter limitation period, but not for "constructive possession," when the adverse claimant holds under "color of title." *See, e.g.*, MICH. COMP. LAWS § 600.5801 (1979) (fixing a period of 5 or 10 years when there is a specified kind of "color of title," whereas the period is 15 years when there is no "color of title"); WASH. REV. CODE § 4.16.020 (1962) (10 years when there is no "color of title") & § 7.28.070 (1962) (7 years when there is "color of title" and payment of taxes). Texas has the greatest range of limitation periods, as well as the most complex classification of various kinds of "color of title." *See* TEX. CIV. CODE ANN. ch. 959, §§ 16.021-.030 (Vernon Supp. 1985).

Other limitation acts—*e.g.*, those of New York and most of the other statutes derived from the New York Revised Statutes of 1828—provide expressly for "constructive possession" but do not shorten the limitation period when the adverse claimant holds under "color of title." *See, e.g.*, CAL. CIV. PROC. CODE §§ 322, 323 (Deering 1972); IDAHO CODE §§ 5-207, 5-209, 5-210 (1979); MONT. CODE ANN. §§ 28-01-06, 28-01-08 (1974); N.Y. REAL PROP. ACT. LAW §§ 511, 521 (Consol. 1985); N.D. CENT. CODE §§ 28-01-06, 28-01-08 (1974); S.D. CODIFIED LAWS ANN. §§ 15-3-1, 15-3-2, 15-3-10 (1984).

Even when statutory "color of title" provisions provide expressly only for a shorter limitation period, the courts have generally applied the "constructive possession" doctrine when it would favor an adverse claimant holding under "color of title." *See, e.g.*, Monroe v. Rawlings, 331 Mich. 49, 49 N.W.2d 53 (1951). Moreover, even when there is no statutory "color of title" provision most courts have given an adverse claimant holding under "color of title" the benefit of the "constructive possession" doctrine. *See, e.g.*, Town of Nantucket v. Mitchell, 271 Mass. 62, 170 N.E. 807 (1930); Montgomery v. Branon, 125 Vt. 362, 216 A.2d 41 (1965).

79. *See, e.g.*, N.M. STAT. ANN. § 27-1-22 (1978).

80. *See, e.g.*, Lott v. Muldoon Road Baptist Church, Inc., 466 P.2d 815 (Alaska 1970); Reay v. Butler, 95 Cal. 206, 30 P. 208 (1892); Gochenour v. Logsdon, 375 Ill. 139, 30 N.E.2d 666 (1940); Lindt v. Uihlein, 116 Iowa 48, 89 N.W. 214 (1902); West v. Middlesex Banking Co., 33 S.D. 465, 146 N.W. 598 (1914); Texas Land Co. v. Williams, 51 Tex. 51 (1879) (semble).

Contra Sparks v. Douglas & Sparks Realty Co., 19 Ariz. 123, 166 P. 285 (1917); Polanski v. Town of Eagle Point, 30 Wis. 2d 507, 141 N.W.2d 281 (1966). Such decisions are based on the theory that "good faith" is not an essential component of "color of title" and that the courts should not add it when the legislature has not expressly imposed a "good faith" requirement.

ment constituting his "color of title." One should note, however, that the "good faith" requirement in "color of title" cases imposes only a minimal restriction on the adverse claimant.[81]

Professor Helmholz concedes that the "color of title" cases involve "a special situation and problem."[82] The question is whether even the minimal restriction imposed when "color of title" must be accompanied by "good faith" is also imposed in adverse possession cases when the adverse claimant does not rely on "color of title."

B. Possession in Good Faith but Without Color of Title

Professor Helmholz asserts that "good faith" is "a positive and relevant factor" in many recent cases in which the adverse claimant was in possession without "color of title,"[83] but the recent cases he cites do not support his assertion. The common characteristic of the cases Professor Helmholz cites—some from state courts of last resort,[84] some from state

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81. The "good faith" requirement

> merely means that a person honestly believes that he has acquired a good title regardless of his knowledge and mental capacity, and it exists wherever possession is taken in belief that such taking is rightful. Knowledge on the part of the claimant that the title was defective will not impeach good faith, for a man will speculate in the purchase of land where he knows that there are imperfections and irregularities in the chain of title, or even when he has knowledge of another claim under a different [record] title. Where a claimant knows a title is worthless, [however,] all trace of good faith is lacking, and there is no [effectual] color of title. . . . [A]nd when a party claims adversely, it is not necessary for him to show that he went into possession in good faith, but the burden of showing fraud is upon the opposite party. If possession is commenced in good faith, subsequent knowledge of outstanding rights . . . is not bad faith to prevent the establishment of title by adverse possession.

5 G. THOMPSON, *supra* note 15, at § 2663.

The minimal standard of "good faith" depicted in the quoted passage does not apply in some states if the document claimed to constitute "color of title" is "void on its face." *See, e.g.*, Larkin v. Wilson, 28 Kan. 367 (1882); Hicks v. Hughes, 223 La. 290, 65 So. 2d 603 (1953); Lowery v. Garfield County, 122 Mont. 571, 208 P.2d 478 (1949). *Contra* Reddick v. Long, 124 Ala. 260, 27 So. 402 (1899); Bloom v. Strauss, 70 Ark. 483, 69 S.W. 548 (1902); Wilson v. Atkinson, 77 Cal. 485, 20 P. 66 (1888); Barger v. Hobbs, 67 Ill. 592 (1873); Jessee v. Jessee, 310 Ky. 565, 221 S.W.2d 462 (1949); Miesen v. Canfield, 64 Minn. 513, 67 N.W. 632 (1896); Turner v. Sanchez, 50 N.M. 15, 168 P.2d 96 (1946); Power v. Kitching, 10 N.D. 254, 86 N.W. 737 (1901); Blacksburg Mining & Mfg. Co. v. Bell, 125 Va. 565, 100 S.E. 806 (1919).

82. *Adverse Possession, supra* note 1, at 337.

83. *Id.* at 338-41 nn.27-45.

84. Barclay v. Tussey, 259 Ark. 238, 532 S.W.2d 193 (1976); Reeves v. Metropolitan Trust Co., 254 Ark. 1002, 298 S.W.2d 2 (1973); Clark v. Mathis, 253 Ark. 416, 486 S.W.2d 77 (1972); Anderson v. Cold Spring Tungsten, Inc., 170 Colo. 7, 458 P.2d 756 (1969); Loewenberg v. Wallace, 151 Conn. 355, 197 A.2d 634 (1964); Morehead v. Parks, 213 Kan. 806, 518 P.2d 544 (1974); Coleman v. French, 233 So. 2d 796 (Miss. 1970); Allen v. Thomas, 215 So. 2d 882 (Miss. 1968); Walker v. Walker, 509 S.W.2d 102 (Mo. 1974); Crane v. Loy, 436 S.W.2d 739 (Mo. 1968); Hewes v. Bruno,

intermediate appellate courts,[85] and two from federal courts[86]—is that the true owner argued that the adverse claimant's possession was *not* adverse and under "claim of right" *because* the claimant *honestly* believed that he owned the land in question. All or most of these cases hold or state that "honest possession" provides as good a basis for a claim of title by adverse possession as does "bad faith possession"; but none of these cases requires "honest possession" or holds that it provides a better basis for a claim of title by adverse possession than does "bad faith possession."

A number of the recent cases Professor Helmholz cited in support of his assertion as to "the relevance of honest possession" involved a dispute between adjoining landowners, one of whom had been in possession of a strip of land belonging to the other because of a mistake as to the location of the boundary between their parcels of land.[87] The authorities are in conflict as to whether the encroaching possession in such cases is "adverse" and therefore starts the statute of limitations running in favor of the wrongful possessor. Under the so-called "Connecticut rule," the possession is "adverse" even though the wrongful possessor acted in "good faith"—*i.e.*, in the honest belief that he owned the disputed strip of land—and if apprised of his mistake, would have relinquished possession.[88] Under the so-called "Maine rule," possession of a strip of land

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121 N.H. 32, 424 A.2d 1144 (1981); Mannillo v. Gorski, 54 N.J. 378, 255 A.2d 258 (1969); Leach v. West, 504 P.2d 1233 (Okla. 1972); Calfee v. Duke, 544 S.W.2d 640 (Tex. 1976); Butler v. Hanson, 455 S.W.2d 942 (Tex. 1970); Somon v. Murphy Fabrication & Erection Co., 160 W. Va. 84, 232 S.E.2d 524 (1977); Beasley v. Konczal, 87 Wis. 2d 233, 275 N.W.2d 634 (1979).

85. Knapp v. Wise, 122 Ariz. 327, 594 P.2d 1023 (Ct. App. 1979); Brehm v. Johnson, 531 P.2d 991 (Colo. App. 1974); Niles v. Churchill, 29 Colo. App. 283, 482 P.2d 994 (1971); Patient v. Stief, 49 Ill. App. 3d 99, 363 N.E.2d 927 (1977); Ewald v. Horenberger, 37 Ill. App. 3d 348, 345 N.E.2d 524 (1976); Ford v. Eckert, 406 N.E.2d 1209 (Ind. App. 1980); Penn Cent. Transp. Co. v. Martin, 170 Ind. App. 519, 353 N.E.2d 474 (1976); Robbins v. Eotoff, 39 Mich. App. 589, 197 N.W.2d 912 (1972); Ross v. McNeal, 618 S.W.2d 224 (Mo. App. 1981); Cash v. Gilbreath, 507 S.W.2d 931 (Mo. App. 1974); West v. Tilley, 33 App. Div. 2d 228, 306 N.Y.S.2d 591 (1970); Root v. Mecom, 542 S.W.2d 878 (Tex. Civ. App. 1976); Miller v. Fitzpatrick, 418 S.W.2d 884 (Tex. Civ. App. 1967).

86. Chapman v. Moser, 532 F.2d 426 (5th Cir. 1976); Gary v. Dane, 411 F.2d 711 (D.C. 1969).

87. *See Adverse Possession, supra* note 1, at 340-41 nn.36-45.

88. The "Connecticut rule" derives its name from the early leading case of French v. Pearce, 8 Conn. 439 (1831), in which the court stated:

> The possession alone, and the qualities immediately attached to it, are regarded. . . . If he [the adverse claimant] intends a wrongful disseisin, his actual possession for fifteen years, gives him a title; or if he occupies what he believes to be his own, a similar possession gives him a title. Into the recesses of his mind, his motives or purposes, his guilt or innocence, no inquiry is made. It is for this obvious reason that it is the visible and adverse possession, with an intention to possess, that constitutes its adverse character, and not the remote views or belief of the possessor.

beyond the possessor's boundary is not deemed "adverse" unless the intent of the possessor is "to claim title to all land within a certain boundary on the face of the earth, whether it shall eventually be found to be the correct one or not."[89] In short, only possession in "bad faith" can be "adverse" under the "Maine rule."[90]

Although the "Maine rule" was probably the majority rule at the end of the nineteenth century, commentators have subjected it to strong criticism for a variety of reasons, including the following:

(1) It is undesirable to have a rule requiring "an inquiry as to the intention which the possessor may have as to his course of action in case there should be a mistake, an intention which ordinarily has no existence whatsoever" and which, even if it exists, may well be undiscoverable.[91]

(2) Unless the possessor's "intention" was communicated to a third party, it can only be established by the possessor's testimony; and it is undesirable to have a legal rule that tempts an adverse claimant who took possession of land beyond his own boundary because of an "honest mistake" to testify falsely, when litigation ensues, that he always intended to maintain his actual possession whether it was right or wrong.[92]

(3) It is undesirable to have a legal rule that results in "better treatment for a ruthless wrongdoer than an honest landowner."[93]

(4) "In no case except in that of a mistake as to boundary has the element of mistake been regarded as having any significance, and there is no reason for attributing greater weight thereto when the mistake is as to the proper location of a boundary . . . ."[94]

Id. at 443.

89. The rule is called the "Maine rule" because it apparently originated in Preble v. Maine Cent. R. 85 Me., 260, 27 A. 149 (1893). The *Preble* court relied upon Hitchings v. Morrison, 72 Me. 331 (1881); Abbott v. Abbott, 51 Me. 575 (1863); and Lincoln v. Edgercomb, 31 Me. 345 (1850). As Professor Bordwell noted, the required intent under the "Maine rule" is "a conditional intention to oust the true owner if a mistake shall appear,"—an intent "hardly likely to exist where no mistake is dreamed of, and . . . hypothetical where the fact of mistake has been raised but not settled . . . ." Bordwell, *supra* note 28, at 153.

90. The "Maine rule" is based on the identification of "adverse possession" with "disseisin," which was deemed to require "an express intention to oust the old owner." Bordwell, *supra* note 28, at 152. Despite Professor Helmholz's statement to the contrary, the "Connecticut rule" is clearly older than the "Maine rule."

91. *See* 4 H. TIFFANY, *supra* note 7, at § 1159.

92. 1 W. WALSH & R. NILES, CASES ON PROPERTY 220 (2d ed., R. Niles & E. Million, 1951).

93. 7 R. POWELL, *supra* note 24, at 1015.

94. *See* 4 H. TIFFANY, *supra* note 7, at § 1159 n.16 and accompanying text, *citing* 2 L. DEMBITZ, LAND TITLES 1397 (1895) as follows: "If possession through mistake were [generally] held not to be adverse, very little room would be left for the statute of limitations, for almost every

(5) "The average person in these boundary disputes occupying by mistake . . . knows that his possession is wrongful if he has no title. Whatever his mental attitude may be if his possession is in fact wrongful, his neighbor may maintain ejectment against him, and the statute necessarily runs against that right of action . . . ."[95]

The "Connecticut rule" has steadily gained adherents during the twentieth century, and now is clearly the majority rule.[96] Only two of the cases Professor Helmholz cites in support of his assertion that "honest belief seems to matter" really effect a shift from the "Maine rule" to the "Connecticut rule,"[97] and none of the cases cited by Professor Helmholz

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man who buys land under a bad title labors under the mistaken idea that his deed is good and effectual." After citing cases in support of his statement, Dembitz stated,

> [t]he court remarks properly in these cases that the occupant's rights depend not on what he says, but what he does; not on his mental condition, but on his entry. As his mistake would not have been a defense to an ejectment, the statute began to run when by mistake he entered.

See L. DEMBITZ 1397 n.194.

95. 3 AM. L. PROP., *supra* note 7, § 15.5 at 789.

96. The "Connecticut rule" is now the "majority rule." *See* 3 AM. L. PROP., *supra* note 7, at § 15.5 nn.1-4. However, as Professor Bordwell pointed out more than six decades ago, "Even in a single jurisdiction the cases are a source of confusion rather than enlightenment." Bordwell, *supra* note 28, at 152. *See also* 4 H. TIFFANY, *supra* note 7, § 1159, at 844 ("The decisions of a particular court in this regard are not infrequently lacking in entire consistency, . . . and occasionally the judicial discussion of the subject is such as to leave us somewhat in doubt as to the exact position of the court on the question.").

97. The two cases are Mannillo v. Gorski, 54 N.J. 378, 255 A.2d 258 (1969), and Hewes v. Bruno, 121 N.H. 32, 424 A.2d 1144 (1981), *cited in Adverse Possession, supra* note 1, at 340 nn.36 & 37. West v. Tilley, 33 A.D.2d 288, 306 N.Y.S.2d 591 (1970), *cited in Adverse Possession, supra* note 1, at 340 n.38, simply follows earlier New York cases applying the "Connecticut rule"—*e.g.*, Belotti v. Bickhardt, 228 N.Y. 296, 127 N.E. 239 (1920), in which the court stated the following rule: "Adverse possession, even when held by a mistake or through inadvertence, may ripen into a prescriptive right [sic] after 20 years of such possession . . .; the actual physical occupation and improvement being, in a proper case, sufficient evidence of the intention to hold adversely." *Id.* at 302, 127 N.E. at 241. However, the attempt of the *West* court to distinguish Van Valkenburgh v. Lutz, 304 N.Y. 95, 106 N.E.2d 28 (1952), on the ground that "there was no proof that claimant by mistake placed a building on adjoining lands" and that, "[t]o the contrary he testified . . . that he knew at the time of construction that the building was not on his land" is based on a failure to read the *Van Valkenburgh* case carefully. 33 A.D.2d at 232, 306 N.Y.S.2d at 595. In fact, in *Van Valkenburgh*, the adverse claimant had built a garage that encroached on the adjoining tract under the belief that "he was getting it on his own property," but his possession was held not to be adverse as to the unintended encroachment. The *Van Valkenburgh* decision, however, appears to be aberrational. *See infra* notes 38-40 and accompanying text.

The rest of the cases cited in *Adverse Possession, supra* note 1, at 340-41 nn.38-40 & 45, to the extent that they apply the "Connecticut rule," also follow well-established rules in their respective jurisdictions. Ewald v. Horenberger, 37 Ill. App. 3d 348, 345 N.E.2d 524 (1976), *cited in Adverse Possession, supra* note 1, at 341 n.40, involved a dispute as to ownership of an entire tract occupied by the adverse claimant and was not the type of "boundary mistake" case in which courts have

holds that a possessor who honestly, but mistakenly, believes that he owns the disputed strip of land should be given *more* favorable treatment than one who acts in "bad faith." Both the recent cases and earlier cases adopting the "Connecticut rule" simply hold that the honest but mistaken possessor should not be given *less* favorable treatment than the "bad faith" possessor.[98]

In addition to the "mistaken boundary" cases, Professor Helmholz also cites, in support of his conclusion as to "the relevance of honest possession," a number of cases in which the courts did not treat the adverse claimant's "mistake" as decisive, but nevertheless rejected the true owner's contention that only possession in "bad faith" could be deemed to be "adverse," "hostile," and/or "under claim of right" and held that "good faith" possession would enable the adverse claimant to acquire title by adverse possession.[99] Some of these cases merely mentioned in passing that the adverse claimant thought he owned the disputed land, without indicating whether this fact had any particular weight.[100] Most of these cases are not really on point,[101] although they may contain lan-

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applied either the "Maine rule" or the "Connecticut rule." In Beasley v. Knoczal, 87 Wis. 2d 233, 275 N.W.2d 634 (1979), the court applied an unusual variant of the "Connecticut rule" under which wrongful possession in "good faith" for the statutory limitation period with the "acquiescence" of the true owner gives the wrongful possessor title to the land possessed. The Wisconsin court said this rule was adopted to avoid the hardship imposed on honest but mistaken possessors by the "Maine rule." Elsewhere, the doctrine of "boundaries by acquiescence" seems to be based on the theory of a tacit "boundary line agreement" evidenced by the parties' "acquiescence" for the statutory limitation period.

98. *See Adverse Possession, supra* note 1, at 340-41 nn.36-40 & 45. The principal case Professor Helmholz discusses in the text of *Adverse Possession* is Mannillo v. Gorski, 54 N.J. 378, 255 A.2d 258 (1969); he concedes that "the main reason" given in *Mannillo* for adopting the "Connecticut rule" is simply that "no distinction should be drawn between them"—*i.e.*, between "the willful trespasser" and "the honest but mistaken trespasser." *Adverse Possession, supra* note 1, at 340.

See also Gary v. Dane, 411 F.2d 711 (D.C. Cir. 1969) (applying the settled District of Columbia rule that "a claim of adverse possession may be rooted in ignorance or mistake" in deciding a "mistaken boundary" case). In a footnote supporting its statement as to the D.C. rule, the court said, "It suffices if there was an intent to possess the disputed area, even if this intent was grounded in ignorance or mistaken notions." *Id.* at 714 n.8. This makes it clear that the court is simply recognizing that possession in the "honest belief" that the adverse claimant is owner of the "disputed area" is just as effective as deliberate "bad faith" possession, when an adverse claimant seeks to acquire title by adverse possession; there is no suggestion that "honest belief" confers any advantage on the adverse claimant.

99. *See, e.g.*, Barclay v. Tussey, 259 Ark. 238, 532 S.W.2d 193 (1976); Calfee v. Duke, 544 S.W.2d 640 (Tex. 1976).

100. *See, e.g.*, Knapp v. Wise, 122 Ariz. 327, 594 P.2d 1023 (Ct. App. 1919) (plaintiff and defendant succeeded in establishing title by adverse possession to different parcels, each originally owned by the other).

101. *See, e.g.*, Cash v. Gilbreath, 507 S.W.2d 931, 934-35 (Mo. App. 1974) (sole possessor may

guage that, taken out of context, appears to support Professor Helmholz's assertion that "good faith" is a factor favoring the adverse claimant. Professor Helmholz's quotation of short passages from several of these cases—entirely out of context—creates a misleading impression as to "the relevance of honest possession."

For example, Professor Helmholz quotes[102] from *Miller v. Fitzpatrick* the following testimony by the adverse claimant's predecessor in title: "I thought it was my property or I wouldn't have been mowing it."[103] This quotation is used to support Professor Helmholz's assertion that "title was acquired by possession" in *Miller v. Fitzpatrick*.[104] But in fact the *Miller* court held that the possession of the adverse claimant's predecessor was not "adverse," and thus could not be "tacked" to the adverse claimant's possession, because it was not proved that the predecessor intended to hold any of the land "adversely or hostile" [sic] to the true owner, the predecessor having taken possession under "the mistaken belief" that his deed covered the property, and having only "intended to secure the property deeded to him but not to take any property not within his deed."[105] *In short, the court actually held the possession of the adverse claimant's predecessor was not "adverse" because he acted in "good faith" instead of "bad faith."*

Professor Helmholz summarizes[106] *Reeves v. Metropolitan Trust Co.* as follows:

> Two parcels of land were claimed by both parties. The defendant was the record owner of the two parcels, but the plaintiff had been using both of

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hold adversely to cotenants even though he did "not intend to take away from the true owner something which he knows belongs to another," or is "indifferent as to the facts of the legal title," provided the sole possessor's acts of ownership are "overt and notorious"—"especially . . . where . . . the land is openly known as the possessor's land and the true owners live in the neighborhood and see and know of the condition of affairs"); Root v. Mecom, 542 S.W.2d 878 (Tex. Civ. App. 1976) (possession of trust beneficiary is not adverse to trustee when trustee had no notice of beneficiary's adverse claim).

See also Chapman v. Moser, 532 F.2d 426 (5th Cir. 1976), applying TEX. CIV. STAT. art. 5519 (now codified as TEX. CIV. CODE ANN. ch. 959 §§ 16.021-.051 (Vernon Supp. 1985)), which expressly requires "good faith" in some cases in which there is no "color of title." Article 5519 is a "residual" limitation provision requiring 25 years of adverse possession in cases not covered by other limitation provisions. *Compare* TEX. CIV. CODE ANN. ch. 959 §§ 16.024 (Vernon Supp. 1985) (3 years), 16.025 (Vernon Supp. 1985) (5 years), 16.026 (Vernon Supp. 1985) (10 years).

102. 418 S.W.2d 884 (Tex. Civ. App. 1967), *quoted in Adverse Possession, supra* note 1, at 341.

103. 418 S.W.2d at 889.

104. *Adverse Possession, supra* note 1, at 341.

105. 418 S.W.2d at 888.

106. 254 Ark. 1002, 498 S.W.2d 2 (1973).

> them. The first parcel the court awarded to the plaintiff, who had "enclosed and possessed the tract for twenty years in the good faith belief that [he] owned it." The second the court awarded to the defendant. The plaintiff had enclosed the parcel in order to house his dog, but he "admit[ted] candidly that he knew the land did not belong to him." The distinction in treatment thus depended on the existence of an honest mistake about the first parcel, as against a knowing trespass [sic] on the second.[107]

A careful reading of *Reeves* shows, however, that Professor Helmholz's characterization of the case is both inaccurate and misleading. *First*, the court did *not* decide in favor of the adverse claimants as to the first parcel *because* of their "good faith belief" that they owned it. The only contested issues on appeal, as to the first parcel, were (a) whether the adverse claimants' possession must be deemed permissive because the record owner had a "practice of allowing its neighbors to use its [vacant] land permissively," and (b) whether the adverse claimant's possession was open and notorious when "the encroachment was not readily visible from the street." The court's decision was negative on both issues because (a) the true owner's practice was not "brought home" to the adverse claimants, and (b) it was the true owner's duty "to keep itself informed with respect to adverse occupancy of its property."[108] *Second*, the court seemingly based its decision as to the second parcel on the complete lack of *any* "claim of right" by the adverse claimants, rather than on their lack of "good faith." The court stated not only that Mr. Reeves admitted "candidly that he knew the land did not belong to him"[109] but also that Mr. and Mrs. Reeves "testified that they did not mean to claim any land they did not own."[110] Professor Helmholz's quotation of the first statement and omission of the second is thus misleading in suggesting that it was the Reeves' lack of "good faith" that caused the adverse decision as to the second parcel.

Professor Helmholz set out[111] only part of an excerpt from the trial transcript quoted in *Butler v. Hanson*. He used the adverse claimant's statement, "I figured it [the disputed land] was mine, it was in my fence

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107. *Adverse Possession, supra* note 1, at 338.

108. 254 Ark. at 1003, 498 S.W.2d at 3.

109. *Id.* at 1004, 498 S.W.2d at 4.

110. *Id.* It should be noted that it was doubtful whether Reeves ever established "actual possession" of the second parcel, which was outside the hedge they planted to mark the boundary of the first parcel and was used only as the site of an "enclosed pen" to house their dogs after the city passed a "dog leash law." The brief opinion does not indicate how much of the second parcel the pen occupied, how substantial the pen was, or how frequently it was used.

111. 455 S.W.2d 942 (Tex. Civ. App. 1970).

line,"[112] to show that "honest belief seems to matter." But a careful reading of the entire *Butler* opinion demonstrates that the court simply held that the evidence—the tract was fenced, the land was used for thirty or forty years by the claimant and his predecessors under "claim of right," and "the general reputation in the community was that the property was owned by" them[113]—was sufficient to sustain the trial court's judgment in favor of the adverse claimant. The court clearly viewed the excerpt quoted by Professor Helmholz merely as evidence that the adverse claimant held under "a claim of right." The court attached no special significance to the adverse claimant's "good faith" or lack thereof.[114] When the quoted excerpt is read in full, it appears highly probable that the adverse claimant actually "claimed" all the land within his fence whether he had legal title to it or not.[115]

Professor Helmholz's selective use of quotations from several other cases, taken out of context, also creates the misleading impression that "honest possession" was a substantial factor favoring the adverse claimant.[116]

C. The Relevance of an Adverse Claimant's "Bad Faith"

Professor Helmholz asserts not only that "good faith" is a factor favoring the adverse claimant, but also—in a section of his article entitled "Cases of Bad Faith Possession"—that "bad faith" is nearly always fatal to a claim of title by adverse possession.[117] This section is organized

112. *Id.* at 945, *quoted in Adverse Possession, supra* note 1, at 341. The quoted statement is part of a longer excerpt from the transcript set out in the majority opinion, *id.* at 944-45. See also the full text of the relevant testimony set out in the dissenting opinion (not the majority opinion as Professor Helmholz states), *id.* at 948, 950-52.

113. *See* 455 S.W.2d at 945-46.

114. The court mentions neither "good faith" nor "honest possession."

115. *See* 455 S.W.2d at 444-45 (The witness said that, although he knew he did not own "section 3," he nevertheless intended to claim up to the fence, whether or not it enclosed any part of "section 3."). *Butler* is thus similar to many "mistaken boundary" cases in which an adverse claimant intends both to claim only what he owns and to claim to a marked boundary believed to be correct but actually enclosing a neighbor's land.

116. *See* Barclay v. Tussey, 259 Ark. 238, 532 S.W.2d 193 (1976); Robbins v. Eotoff, 39 Mich. App. 589, 197 N.W.2d 912 (1972), *cited in Adverse Possession, supra* note 1, at 338 n.31; Coleman v. French, 233 So. 2d 796 (Miss. 1970), *cited in Adverse Possession, supra* note 1, at 341 n.44; Crane v. Loy, 436 S.W.2d 739 (Mo. 1968), *cited in Adverse Possession, supra* note 1, at 341 n.42. None of these cases really supports the proposition for which it is cited.

117. *Adverse Possession, supra* note 1, at 341-49. This section, entitled "Cases of Bad Faith Possession," constitutes the core of *Adverse Possession*. Professor Helmholz began by quoting Jasperson v. Scharnikow, 150 F. 571, 572 (9th Cir. 1907), as follows: "This idea of acquiring title by

in a peculiar way, starting with cases in which, he asserts, the courts refused "to reward the bad faith possessor" by describing his possession "as somehow less than sufficient to acquire title";[118] then considering cases in which, he asserts, "in order to reach the same result," the courts have characterized the possession of an adverse claimant who acts in bad faith as "permissive";[119] then considering cases in which, he asserts, "judges have not felt obliged to resort to any special characterization to deny the claim of the bad faith possessor";[120] then considering cases in which, he asserts, the courts have rejected claims of title by adverse possession because "the evidence show[ed] that the possessor knew enough of the true state of the title to offer money to the record owner";[121] and, finally, trying to explain cases in which courts "have awarded title to adverse possessors who know, or should have known, that the land in question belonged to someone else when they entered" on the ground

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larceny does not go in this country." *Id.* at 572. It is not clear whether the *Jasperson* court thought that a "bona fide claim" was required as a matter of general American law or simply that Washington law required it. But the rule was then generally settled in the United States that an adverse possession could be established on the basis of a "claim of right" asserted either in "good faith" or in "bad faith."

Even if *Jasperson* were deemed to state a federal common-law rule prior to Erie R.R. v. Tompkins, 304 U.S. 64 (1938), it clearly could not be considered to have any such effect after *Erie*.

A "good faith" requirement was not adopted in Washington until two years after the court decided *Jasperson*. *See* Ramsey v. Wilson, 52 Wash. 111, 100 P. 177 (1909) (seemingly holding that possession must be held in "good faith" in order to ripen into title under a 10-year limitation act which did not require "color of title"). None of the Washington cases the *Jasperson* court cited so holds; in all of the cases, the real issue was whether the adverse claimant had any "claim or right" at all, not whether his "claim" was made in "good faith" or in "bad faith."

Although the "good faith" requirement was repeated in post-*Ramsey* cases, there are no recent Washington cases actually holding that "bad faith" precludes acquisition of title by adverse possession. On the other hand, two cases decided in the 1940's held that an adverse claimant had acquired title despite his having acted in "bad faith." State v. Stockdale, 34 Wash. 2d 857, 210 P.2d 686 (1949); Bowden-Gazzam Co. v. Hogan, 22 Wash. 2d 27, 154 P.2d 285 (1944). These cases have been deemed to overrule *Ramsey sub silentio*. See Stoebuck, *The Law of Adverse Possession in Washington*, 35 WASH. L. REV. 53, 83-84 (1960). Later cases, however, leave the Washington rule as to "good faith" uncertain. *See, e.g.*, Wickert v. Thompson, 28 Wash. App. 516, 517-18, 624 P.2d 747, 748 (1981), where the court said:

> The "claim of right" to which the doctrine refers is simply that the claimant is in possession as owner, and not in recognition of or subordination to the record title owner.... The term "good faith" adds only confusion to the doctrine.... Good faith was required for the original entry only and subsequent discovery of the mistake did not prevent acquisition of title if the other conditions of adverse possession were met.

See also Sisson v. Koelle, 10 Wash. App. 746, 753 n.2, 520 P.2d 1380, 1384 n.2 (1974).

118. *Adverse Possession, supra* note 1, at 342-43.

119. *Id.* at 343-44.

120. *Id.* at 344-45.

121. *Id.* at 345-46.

that these adverse possessors had strong countervailing "equities."[122] This article will now examine the cases Professor Helmholz cites in support of each of these propositions.[123]

1. Cases in which the Adverse Claimant Assertedly Failed on the Stated Ground that He Acted in "Bad Faith"

One might suppose that the cases Professor Helmholz cites in support of the assertion that "[i]n the majority of recent cases which have dealt with the problem, . . . judges have not felt obligated to resort to any special characterization to deny the claim of the bad faith possessor" would in fact squarely support Professor Helmholz's conclusions. In fact, however, the first cited case[124] holds, to the contrary, that an adverse claimant did acquire title by adverse possession to some thirty acres that he admitted he did not own but "was claiming by limitation." Although the second case[125] Professor Helmholz cited supports his argument, it was an Illinois intermediate appellate court decision which the Illinois Supreme Court almost immediately "disapproved" in an opinion reaffirming its long-settled rule that a wrongful possession is "adverse" whether the adverse claimant holds in "good faith" or "bad faith."[126]

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122. *Id.* at 347-48.

123. At the end of this section of his article, Professor Helmholz concedes that "three or four cases decided during the period [examined by him] do . . . truly fit the pure possession model of adverse possession" in that "[i]n them the possessor knew he had no title at the time he entered and he nonetheless prevailed." *Adverse Possession, supra* note 1, at 348 & nn.73-76 (*citing a total of 9 cases!*).

124. Hoppe v. Sauter, 415 S.W.2d 912 (Tex. Civ. App. 1967), *cited in Adverse Possession, supra* note 1, at 344 n.59. The disputed 30.833-acre tract was mainly used for cutting timber and was entirely enclosed as if it were part of an adjoining 100-acre tract the adverse claimants actually owned. The court quoted a typical statement as to the meaning of "claim of right": "the entry of the limitation claimant must be with the intent to claim the land as his own, to hold it for himself." 416 S.W.2d at 914. The court held that the adverse claimant's actions "proclaimed their intention to claim the land as their own." *Id.* at 915.

125. Hansen v. National Bank of Albany Park, 59 Ill. App. 2d 877, 879, 376 N.E.2d 365, 367 (1978), *cited in Adverse Possession, supra* note 1, at 345 n.60, in which the court said, "When an adverse claimant comes into possession of land thinking that he is not the record title holder, such possession lacks the requisite hostility for obtaining title by adverse possession." 59 Ill. App. 3d at 879, 376 N.E.2d at 376.

126. Joiner v. Janssen, 85 Ill. 2d 74, 421 N.E.2d 170 (1980), reversing the judgment of an intermediate appellate panel based on Hansen v. National Bank of Albany Park, 59 Ill. App. 3d 877, 376 N.E.2d 365 (1978). The Supreme Court of Illinois stated that

> [t]he quoted statement [from *Hansen*] which the appellate panel in this case [*i.e., Joiner*] deemed binding and dispositive is simply not an accurate statement of the law . . . . To hold that because the possessor knows or should know that record title is in another precludes any possibility of the possessor's title being adverse, is the antithesis of the doctrine

With one exception, none of the other cases cited by Professor Helmholz provides any substantial support for his assertion as to the effect of "bad faith" possession.

One of the cited cases merely held the possession of a tenant or vendee of the adverse claimant to be the possession of the claimant.[127] Another case held that title to the land in dispute had already "ripened into title" before the adverse claimants acquired it and, even if this were not true, that the adverse claimants' possession was "sufficiently adverse to continue the running of the statute during their occupation of the property."[128] One of the cases was decided under a statute of limitations that expressly required both "color of title" and "good faith."[129] In several cases decided in jurisdictions with statutes requiring a "claim of right," the courts held that the required "claim of right" was lacking, but the opinions do not suggest that "bad faith" was a relevant consideration.[130] In one case in which an "occupying claimant" sought compensation for the improvements he had installed on the land, the intermediate appellate court first recognized that the claimant could not recover unless he proved "adverse possession . . . [of] the same character . . . as will put into operation the statute of limitations," and then held that the claim-

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> of adverse possession as it has existed in this state. . . . The possessor's good faith in claiming title is, of course, required by the statutory provisions relating to possession for seven years under color of title . . . it is not relevant under the 20-year doctrine . . . .

85 Ill. 2d at 80-81, 421 N.E.2d at 173-74. The *Joiner* court's citation of Illinois Central R.R. v. Houghton, 126 Ill. 233, 239, 18 N.E. 301, 303 (1888) (adverse possession must be "under claim of title" but "[i]t need not . . . be under a rightful claim") makes it clear that the Illinois courts have from an early date held that a "claim of right" is sufficient whether asserted in "good faith" or in "bad faith."

127. SSM Invs. v. Siemers, 291 N.W.2d 383 (Minn. 1980), *cited in Adverse Possession, supra* note 1, at 345 n.62.

128. Grimstad v. Dordan, 256 Or. 135, 471 P.2d 778 (1970) *cited in Adverse Possession, supra* note 1, at 345 n.62. The holding was based on the adverse claimants' testimony; one of them denied any doubt as to location of the boundary between their tract and the adjoining tract, and the other "testified that he had no doubt about the correct line between the tracts, but that he was aware of a probable error in the legal description in his deed" affecting the boundary. *Id.* at 140, 471 P.2d at 781. The court said that, even if this testimony disclosed a "conscious doubt," it also disclosed a "hostile" intent to occupy up to what was deemed to be the correct boundary. *Id.*

129. Baker v. Benedict, 92 N.M. 283, 587 P.2d 430 (1978), *cited in Adverse Possession, supra* note 1, at 345 n.62, applying N.M. STAT. ANN. §§ 23-1-21 (Supp. 1975) ("color of title"), 23-1-22 (Supp. 1975) ("in good faith under color of title").

130. Gerwitz v. Gelsomin, 69 A.D.2d 992, 416 N.Y.S.2d 127 (1979); Lewis v. Village of Lyons, 54 A.D.2d 488, 389 N.Y.S.2d 674 (1976); Lutz v. Van Valkenburgh, 27 A.D.2d 735, 277 N.Y.S.2d 42 (1967) *aff'd*, 21 N.Y.S. 937, 289 N.Y.S.2d 767, 237 N.E.2d 84 (1968); Root v. Mecom, 542 S.W.2d 878 (Tex. Civ. App. 1976); Hensz v. Linnstaedt, 501 S.W.2d 463 (Tex. Civ. App. 1973)—all *cited in Adverse Possession, supra* note 1, at 345 n.62.

ant's possession must be in "good faith" as well as under "color of title."[131] But the court was clearly incorrect on the latter point, because the jurisdiction's highest court had settled the law to the contrary.[132] Most of the cases Professor Helmholz cites, on the other hand, simply held that the adverse claimant failed to establish one or more of the usual elements of adverse possession, *i.e.*, "actual," "open and notorious," "hostile," "exclusive," and "continuous" possession.[133] In one case, the court simply held that a motion for judgment on the adverse claimants' counterclaim was properly refused because they had not proved title by adverse possession "as a matter of law," and that the adverse possession issue was properly left to the jury, which found against the adverse

131. Hill v. Cape Coral Bank, 402 So. 2d 945 (Ala. 1981), *cited in Adverse Possession, supra* note 1, at 345 n.62. The claim for compensation was advanced under ALA. CODE § 6-6-286 (1977), which authorizes such claims where the defendant "had adverse possession . . . [of] the same character . . . as will put into operation the statute of limitations." The court's holding, in effect, incorporated ALA. CODE § 6-5-200 (1977), which requires either (1) "a deed or other color of title purporting to convey title to" the adverse claimant, (2) the listing of the land for taxation by the adverse claimant, or (3) a claim of title based on "descent cast or devise from a predecessor in title who was in possession of the land."

132. *See* Foster v. Foster, 267 Ala. 90, 93-94, 100 So. 2d 19, 22 (1958), *quoting* Newsome v. Snow, 91 Ala. 641, 642, 8 So. 377, 378 (1890) as follows:

> It is not essential that [the adverse claimant's] claim of right should be good, or believed to be good. Knowledge that his title is defective does not prevent his possession from being adverse, if the other essential elements exist. . . . Actual claim of ownership, not the *bona fides* or strength of the claim, is the best test or element of adverse possession.

267 Ala. at 93-94, 100 So. 2d at 22.

133. These cases, cited in *Adverse Possession, supra* note 1, at 345 n.62, include the following: Vick v. Berg, 251 Ark. 573, 473 S.W.2d 858 (1971) (neither "open and notorious" nor "continuous"); Black v. Westwood Properties, Inc., 618 S.W.2d 169 (Ark. Ct. App. 1981) (neither "open and notorious" nor "continuous"); Dillaha v. Temple, 590 S.W.2d 331 (Ark. Ct. App. 1979) (not "hostile"); Shives v. Niewoehner, 191 N.W.2d 633 (Iowa 1971) (not "hostile" because occupying cotenant did not "oust" other cotenants); Whitehall Leather Co. v. Capek, 4 Mich. App. 52, 143 N.W.2d 779 (1966) (not "hostile" because adverse claimant paid rent; thus no prescriptive easement was acquired); Wodall v. Ross, 317 So. 2d 892 (Miss. 1975) (neither "actual" nor "open and notorious"); Monnig v. Lewis, 617 S.W.2d 492 (Mo. Ct. App. 1981) (not "hostile" because "claim of right" was lacking); John v. Turner, 542 S.W.2d 293 (Mo. Ct. App. 1976) (not "hostile" because adverse claimant had acknowledged superior title of true owner); Martin v. Randono, 175 Mont. 321, 573 P.2d 1156 (1978) (neither "hostile" nor "exclusive"); Barnes v. Milligan, 200 Neb. 450, 264 N.W.2d 186 (1978) (not "hostile" because "claim of right" was lacking); Foos v. Reuter, 180 Neb. 301, 142 N.W.2d 552 (1966) (not "actual"); Venator v. Ouier, 285 Or. 19, 589 P.2d 731 (1979) (not "hostile" because of fiduciary relation between the parties); Spangler v. Schaus, 106 R.I. 795, 264 A.2d 161 (1970) (not "hostile" because occupying cotenant did not "oust" cotenants); Holbrook v. Carter, 19 Utah 2d 288, 431 P.2d 123 (1967) (same).

As the parenthetical comments in the preceding paragraph indicate, I do not think the fact that the adverse claimant was acting in bad faith in some of the cited cases is relevant when the court ignored that fact and expressly rested its decision on other grounds that provide a perfectly adequate *ratio decidendi*.

claimants.[134]

The only case that provides substantial support for Professor Helmholz's assertion as to "bad faith" possession is *Carpenter v. Ruperto*.[135] The court's holding in *Carpenter* is hardly surprising, as it simply applied the long-settled Iowa rule purporting to require "good faith" for acquisition of title by adverse possession, a rule that can be traced back at least to 1896.[136] The *Carpenter* case thus does not represent a recent change in Iowa law. One should note, moreover, that the *Carpenter* court's statements that "[k]nowledge of a defect in title is not alone sufficient to preclude proof of good faith" and that "good faith" is negated only "when knowledge of lack of title is accompanied by knowledge of no basis for claiming an interest in the property."[137] Although the court's meaning is unclear, these statements appear to water down the Iowa "good faith" requirement to some extent.

2. *Cases in which the Court Held Against the Adverse Claimant on Other Grounds*

Professor Helmholz asserts that in one group of recent cases the adverse claimants actually failed to acquire title by adverse possession because the court found they held in "bad faith," although the courts purported to decide against the adverse claimants because their possession was "somehow less than sufficient." The courts variously described the possession as "scrambling," "provisional and contingent," or "naked," or as "mere occupancy" or "squatter's" possession in these cases.[138] But most of the cases Professor Helmholz cites do not, in fact,

134. Francis v. Stanley, 574 S.W.2d 629, 633 (Tex. Civ. App. 1978) (The only conduct amounting to adverse possession the claimants adduced was that they had "cleared and cleaned up the lot, and [had] mowed and maintained it;" but there was "also evidence that other lot owners in this area mow and maintain lots they do not claim to own in order to keep up the area and make the property they do own look better").

135. 315 N.W.2d 782 (Iowa 1982), *cited in Adverse Possession, supra* note 1, at 345 n.62.

136. The earlier Iowa cases the court cited in *Ruperto* are Creel v. Hammans, 234 Iowa 532, 535, 13 N.W.2d 305, 307 (1944); Goulding v. Shonquist, 159 Iowa 647, 141 N.W. 24 (1913); and Litchfield v. Sewell, 97 Iowa 247, 251, 66 N.W. 104, 106 (1896) ("there can be no such thing as adverse possession where the party knows he has no title, and that, under the law, he can acquire none by his occupation").

137. *See* 315 N.W.2d at 785. The quoted language is prefaced by the explanation that, "[a]s in *Litchfield*, the possessor in *Goulding* not only knew that he had no title but that he had no claim of title or any right to enter into possession of the property. He was a mere squatter." This passage suggests that the Iowa court may really require only some "claim of right," because the court apparently used the term "squatter" to describe one who has no "claim of right" whatsoever. *Id.*

138. *Adverse Possession, supra* note 1, at 342-43.

support his assertion. In two of the cases, the courts actually held that the adverse claimant did acquire title by adverse possession. In one of these cases,[139] the court's dictum as to "the early American belief that the squatter should not be able to profit by his trespass"[140] was not only irrelevant to the decision of the case[141] but clearly suggests that the court was using "squatter" and "trespasser" as equivalent terms of describe persons, who by a series of trespasses, violate the true owner's exclusive right of possession but fail to establish an actual and exclusive possession of the land in question. In the other case,[142] the court not only held for the adverse claimant, but distinguished an earlier case in which it had held that "[t]he occasional cutting of firewood or the taking of rock" from the disputed tract "could not have been considered other than as a temporary trespass."[143]

In the rest of the cases cited by Professor Helmholz the courts did hold against the adverse claimants. In one case,[144] however, the court really just applied the "Maine rule" (that possession beyond the adverse claimant's true boundary in the honest but mistaken belief that he owned the disputed strip of land, is not "adverse") which actually places a premium on "bad faith." Although the court in another case cited an earlier opinion asserting that a"squatter" can never gain "prescriptive title" to land, no matter how long he holds it, because his possession can never be considered "adverse," the court based its decision on the failure of the adverse claimants to prove actual and exclusive possession of the land in question. The testimony showed that their use of the land (fronting on the Mississippi River) was shared with "[a]nyone in the country around there if they wanted to put a boat in or drag out some piling" or fish there, and that the adverse claimants never tried to exclude anyone from

139. Howard v. Kunto, 3 Wash. App. 393, 477 P.2d 210 (1970), *cited in Adverse Possession, supra* note 1, at 343 n.53.

140. 3 Wash. App. at 399, 477 P.2d at 214, *quoted in Adverse Possession, supra* note 1, at 343 n.53.

141. In Howard v. Kunto, 3 Wash. App. 393, 477 P.2d 210 (1970), the principal issue was whether sufficient privity existed between successive adverse possessors to permit the "tacking" of their periods of possession in order to satisfy the requirement of "continuous" possession for the statutory limitation period.

142. Moss v. James, 411 S.W.2d 104 (Mo. 1967), *cited in Adverse Possession, supra* note 1, at 342 n.48.

143. *Id.* at 107-08, *distinguishing* Herbst v. Merrifield, 133 Mo. 267, 270, 34 S.W. 571, 572 (1896).

144. Miller v. Fitzpatrick, 418 S.W.2d 884, 889 (Tex. Civ. App. 1967), *cited in Adverse Possession, supra* note 1, at 343 n.49. *See supra* note 89.

the property.[145] The other cases[146] do not expressly refer to the "good faith" or "bad faith" of the adverse claimants, and nothing in the opinions suggests that the courts decided these cases on the basis of an unstated belief that "bad faith" should bar the adverse claimants, while disingenuously purporting to base their decisions on the failure of the claimants to prove actual and exclusion possession of the land in question.

Professor Helmholz[147] cites another group of cases to support an assertion that the courts really decided against the adverse claimants because they acted in "bad faith," but characterized the possession of the adverse claimants as "permissive" to conceal the actual basis of their decision, despite the fact that there was no evidence that the adverse claimants ever sought and obtained actual permission from the true owners. Professor Helmholz approves of the results in these cases because he believes an adverse claimant should not be allowed "to take advantage of

145. Wilton Boat Club v. Hazell, 502 S.W.2d 273, 276 (Mo. 1973), *cited in Adverse Possession, supra* note 1, at 343 n.51. The term "squatter" is quite ambiguous. It is sometimes used to indicate that an adverse claimant never established "actual, open and notorious, and exclusive" possession of the land. It is also sometimes used to describe one who "honestly, though mistakenly," thinks the United States or the state where the land is located owns the land he possesses. In cases of the second type, "adverse possessor" status is denied because the possessor lacked any "claim of right" whatever. The close relation between failure to prove "actual, open and notorious, and exclusive" possession and a finding that the "squatter" had no "claim of right" is well-illustrated in the following passage from Blake v. Shriver, 27 Wash. 593, 595-99, 68 P. 330, 330-32 (1902):

> . . . [I]n the great majority of the cases the [initial] squatter, when he desired to leave, would remove to another portion of the town or country and would sell his improvements to some other person; it appearing that nothing more than the value of the improvements was ever obtained at such sales. . . .
>
> The whole testimony convinces us that the claimant . . . simply squatted on the land for present convenience; that he had no color of title or claim of right to it in any sense whatever; that he did not even intend or think of obtaining title to it, by the statute of limitations or in any other way, at the time he settled upon it, or for many years thereafter; that the occupation was purely permissive, by reason for the circumstances . . . . It is not such strolling, straggling occupancy as is shown by the testimony in this case that constitutes a notice of adverse possession. It is the history of most cities of this country that where lands are lying idle, either from being held by non-residents, or from being tied up in lengthy litigation [as in this case], that a certain class of people squat upon them and build for present use what are called shacks or shanties, and are frequently not disturbed for many years. And this is exactly the condition of affairs in Spokane in reference to these lands in dispute.

146. M.C. Dixon Lumber Co. v. Mathison, 289 Ala. 229, 266 So. 2d 841 (1972), *cited in Adverse Possession, supra* note 1, at 342 n.47; DeCola v. Bochatey, 161 Colo. 95, 100, 420 P.2d 395, 397 (1966) ("evidence as to the [hostile] nature and character of [the claimant's] initial use or occupancy of the subject property was very sketchy at best," and "mere occupancy of part of the property from time to time . . . does not add up to adverse possession"), *cited in Adverse Possession, supra* note 1, at 343 n.50.

147. *Adverse Possession, supra* note 1, at 344-45.

his neighbor's good will, or his timidity, by pointing to his own physical possession and the absence of any evidence of consent on the part of his neighbor."[148] Once again, however, the cases he cites to support the argument as to "the relevance of bad faith" do not, in fact, provide any real support for his conclusion. In most of the cases, there was substantial evidence that the adverse claimant's possession was based on the true owner's permission, express[149] or tacit.[150] In one of the cases,[151] the adverse claimant's possession did not continue for the full statutory limitation period, and the possession of his predecessors, which had to be

148. *Id.* at 345.

149. Leon v. Byus, 115 Ariz. 451, 565 P.2d 1312 (Ct. App. 1977) (vendees under land contract); Gameson v. Remer, 96 Idaho 789, 537 P.2d 631 (1975); Roth v. Flieg, 536 S.W.2d 337 (Mo. 1976); Roman v. Roman, 485 Pa. 196, 401 A.2d 361 (1979). In Spring Branch Indep. School Dist. v. Lilly White Church, 505 S.W.2d 620 (Tex. Civ. App. 1973), the inference that express permission was given is practically inescapable. The school district had actually used the school building for school purposes for a long time before it constructed a school building at a distance of about five feet from the church. There was testimony that the church used the school yard for parking and used a well, on the area the school later claimed, as a source of water; that there were graves on the property, including the part the school later claimed; and that the church "allowed the school District to use the property." Although the evidence was disputed as to whether a fence divided the school from the church, there was no evidence that the entry of the school district onto the property was "other than permissive." The court said that "[t]he erection of the school building near the churchhouse and the joint use of the property harmoniously for many years" could lead to no other conclusion than that the church gave permission to the school district to use the property, and held that the statutory limitation period did not begin to run until the date when the school district's "repudiation" of such permission and its "adverse claim" were "brought home to the church." 505 S.W.2d at 622-23.

150. Shishilla v. Edmondson, 61 Ill. App. 3d 187, 377 N.E.2d 1115 (1978) (true owner pointed out surveyor's stakes marking true boundary and adverse claimant "admitted" that a hedge 6 feet inside the true boundary belonged to true owner; in addition, the adverse claimant never had "exclusive" possession of the disputed strip); Lundelius v. Thompson, 461 S.W.2d 153 (Tex. Civ. App. 1970) (the "agreement" was proved by evidence as to the physical facts and the testimony of the parties as to the need for and the use of the "fence" relied on by adverse claimant to show adverse possession). *See also* Gray v. Fitzhugh, 576 P.2d 88 (Wyo. 1978) (claim of prescriptive easement denied; use was "permissive").

151. Wolgamot v. Corley, 523 S.W.2d 491 (Tex. Civ. App. 1975), *cited in Adverse Possession, supra* note 1, at 344 nn.57 & 58. The offer to buy was at the amount tentatively fixed by the record owner, who later stated that he could not sell "at that price." The testimony also indicated that the adverse claimants' predecessors made no "claim of right" whatsoever: "We just lived there. Nobody claimed it and we didn't claim it either .... It was just there, and so, as far as claiming it, you don't claim anything that is not yours." 523 S.W.2d at 494. This testimony elicited the following language, quoted by Professor Helmholz in *Adverse Possession, supra* note 1, at 344 n.58. The quoted language is as follows: " 'Peaceable possession,' even accompanied by acts whose prima facie import is that of hostility may not, in truth be adverse, for the intent of the possessor may bring his acts and conduct into consonance with recognition of the privileges of the true owner. Intent ... is a controlling factor." 523 S.W.2d at 495. This, of course, merely states the view that a "claim of right," not necessarily in "good faith," is essential for "adverse possession."

"tacked" to that of the adverse claimant, was found to have been "permissive" because they had offered to buy the land from the true owner. In still other cases, the courts found that the adverse claimant's possession was "permissive" because he was a grantor who retained possession after making an effective conveyance[152] or was the grantee of a mortgagor claiming against the mortgagee.[153] In the last two situations, the courts have usually presumed the possession to be "permissive" rather than "adverse" unless there is a disclaimer by the possessor.[154] None of the cases Professor Helmholz cites provides any basis for his conclusion that the courts' holdings that the adverse claimant's possession was "permissive" were mere subterfuges designed to conceal the courts' determination not to allow a "bad faith" possessor to acquire title by adverse possession.[155]

The next group of cases Professor Helmholz[156] cites purportedly demonstrates that the courts "regularly" hold that evidence showing "the possessor knew enough of the true state of the title to offer money to the record owner" is "inconsistent with the intention necessary to acquire title by adverse possession"[157] and is fatal to the possessor's claim because the courts are determined not to allow "bad faith" possessors to acquire title by adverse possession. This assertion is surprising because (1) earlier cases generally drew a fairly clear distinction between a genuine offer to buy the land, amounting to a recognition of the true owner's superior title, and a mere offer to buy immunity from suit;[158] and

152. Hood v. Denny, 555 S.W.2d 337 (Mo. App. 1977); Runnels v. Whitfield, 593 S.W.2d 388 (Tex. Civ. App. 1979).

153. Courtney v. Boykin, 356 So. 2d 162, 165 (Ala. 1978) (adverse claimant was grantee of one who gave mortgage to holder of record title, so possessory acts prior to foreclosure were deemed "permissive" in the absence of an express "disclaimer" directed to mortgage holder; in addition, adverse claimant's "rare and widely separated acts do not satisfy the burden [of proof as to adverse possession]; they constitute mere transitory trespasses").

154. *See supra* notes 42 & 44 and accompanying text. The problems arising when a grantor remains in possession are further considered *infra* notes 193-200 and accompanying text.

155. In Massey v. Price, 252 Ark. 617, 480 S.W.2d 337 (1972), the court held that the evidence supported the adverse possessor's claim as to a disputed boundary, but rejected a claimed prescriptive easement because the adverse claimant testified that he just "assumed" that his neighbor did not object to his use of a small part of his land, and therefore "assumed" that the use was "with his permission." This case may support the "claim of right" requirement, but certainly does not support the notion that "bad faith" is fatal to a claim based on adverse possession or adverse use. On the facts, local custom may, indeed, have established that the use in *Massey* was "permissive" because it was "necessary to avoid a ditch."

156. *Adverse Possession, supra* note 1, at 345-46 n.62.

157. *Id.* at 346 n.65.

158. *See, e.g.*, Bailey v. Bond, 237 Ala. 59, 185 So. 411 (1928); Calkins v. Kousouros, 72 Idaho

(2) none of the cases Professor Helmholz cites really supports his argument. Some of these cases do not even involve an offer to pay money.[159] In some of the cited cases, the evidence failed to show that the adverse claimant ever had "actual" possession of the land.[160] In some cases the adverse claimant either paid a substantial rent for use of the land,[161]

150, 237 P.2d 1053 (1952); Munroe v. Pere Marquette Ry., 226 Mich. 158, 197 N.W. 566 (1924); Sanderson v. McManus, 252 S.W.2d 351 (Mo. 1952); Walbrunn v. Ballen, 68 Mo. 164 (1878); Hallowell v. Borchers, 150 Neb. 322, 34 N.W.2d 404 (1948); Headrick v. Fritts, 93 Tenn. 270, 24 S.W. 11 (1893); State v. Stockdale, 34 Wash. 2d 857, 210 P.2d 686 (1923); Bitonti v. Kauffeld Co., 84 W. Va. 727, 120 S.E. 908 (1923); Clithero v. Fenner, 122 Wis. 356, 99 N.W. 1027 (1904). In most of these cases, the courts treated the question whether there was a real offer to buy or only an attempt to buy immunity from suit a question of law. Generally, however, it would seem preferable to treat this as a question of fact, as it was in *Sanderson* and *Walbrunn*. To prove that a real offer to buy exists, the adverse claimant should probably be required to show that he offered to pay an amount approximating the fair market value of the land; but most of the cases do not discuss the relevance of the amount the adverse claimant offered to the true owner.

159. *See, e.g.*, Gurganus v. Kiker, 286 Ala. 442, 241 So. 2d 113 (1970); Tindle v. Linville, 512 P.2d 176 (Okla. 1973)—both *cited in Adverse Possession, supra* note 1, at 346 n.65. In *Gurganus*, there is dictum that "a party's offer of compromise is not provable against him as an implied admission of the weakness of his claim, or of the strength of his adversary's claim," 241 So. 2d at 118, which is directly contrary to the proposition asserted by Professor Helmholz. In both *Gurganus* and *Tindle*, however, the adverse claimant acknowledged the superior title of the true owner, and in *Tindle* the adverse claimant's possession was "permissive" from the start.

160. *See, e.g.*, People's Realty & Dev. Corp. v. Sullivan, 336 So. 2d 1304 (Miss. 1976) (adverse claimants cut timber once, occasionally pastured cattle on the land, and put up a 4-strand wire fence "through a reed brake" by nailing wire to trees); Magelssen v. Atwill, 152 Mont. 409, 451 P.2d 103 (1969) (statutory definition of actual possession was not satisfied because adverse claimant neither enclosed, cultivated, nor improved the land, but only grazed cattle thereon); Beaver v. Davis, 275 Or. 209, 550 P.2d 428 (1976) (evidence was conflicting as to when, if ever, the land was fenced; land was used only for grazing and for cutting firewood), *cited in Adverse Possession, supra* note 1, at 346 nn.64-65.

In Magelssen v. Atwill, 152 Mont. 409, 414, 451 P.2d 103, 105 (1969), the court quoted from Lamme v. Dodson, 4 Mont. 560, 591, 2 P. 298, 303 (1883), to the effect that "the question of adverse possession is one of intention." But Lamme v. Dodson is not on point at all; it was decided on the ground that the adverse claimant was originally a tenant of the true owner and that he could not convert himself into an adverse possessor by making an oral contract to buy the land from his landlord.

161. *See, e.g.*, Ayers v. Day & Night Fuel Co., 451 P.2d 579 (Alaska 1969) ($200 rental payment to true owner), *cited in Adverse Possession, supra* note 1, at 346 n.63; Whitehall Leather Co. v. Capek, 4 Mich. App. 52, 143 N.W.2d 779 (1966) (adverse claimant paid rent for many years), *cited in Adverse Possession, supra* note 1, at 346 n.65. In *Ayers*, the adverse claimant's testimony was "ambiguous" as to the reason for making the $200 payment. The true owner's testimony was that the payment was "rent" at the rate of $50 per month, and it was held that the trial judge's finding that the $200 was paid as rent was not "clearly erroneous." It would seem that the payment of rent made the adverse claimant a tenant whose possession was thereafter rightful, but the court placed its decision on the ground that " [t]he payment of the $200 as rent . . . was a recognition of [the true owner's] title to the property, was inconsistent with [the adverse claimant's] claim of title by adverse possession, and interrupted the continuity of the adverse possession period . . . ." 451 P.2d at 582.

made a genuine offer to buy it,[162] and/or acknowledged in some other way the superior title of the true owner so that the latter could reasonably infer that the claimant was not holding "adversely" to him.[163] The adverse claimant's possession in other cases was clearly rightful because the true owner either (1) expressly gave his permission[164] or (2) was a cotenant of the adverse claimant who was never "ousted" or "excluded" by the adverse claimant.[165] None of the cited cases clearly involved a mere offer to compromise a doubtful claim or to buy immunity from suit. In all of these cases, the decisions appear to be correct, but they do not

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162. *See, e.g., Adverse Possession, supra* note 1, at 346 n.65: Kerlin v. Tensaw Land & Timber Co., 390 So. 2d 616 (Ala. 1980) ("efforts to buy property from record owner" by grantors of adverse claimants disproved the "adverseness" of their possession and thus precluded "tacking"); Kittrell v. Scarborough, 287 Ala. 155, 249 So. 2d 814 (1971) (offer to buy "if the price was right"); Davis v. Mayweather, 255 Ark. 966, 504 S.W.2d 741 (1974) (adverse claimants tried to "buy out the owners of the other [undivided] half interest); Dunlop v. Twin Beach Park Ass'n, 111 Mich. App. 261, 264, 314 N.W.2d 578, 579-80 (1981) (adverse claimants really offered to buy the land, not merely "to compromise a disputed liability or . . . to make peace in a controversy"); People's Realty & Dev. Corp. v. Sullivan, 336 So. 2d 1304 (Miss. 1976) (adverse claimants "attempted to buy the disputed property"); Campano v. Scherer, 49 A.D.2d 642, 370 N.Y.S.2d 237 (1975) (parties prepared but did not execute a "sales agreement" after adverse claimant "acknowledged" true owner's superior title); White v. Chandler, 52 Or. App. 951, 630 P.2d 372 (1981) (adverse claimant offered "to buy the property"); Spinks v. Estes, 546 S.W.2d 390 (Tex. Civ. App. 1977) (same); Nagel v. Hopingardner, 464 S.W.2d 472 (Tex. Civ. App. 1971) (testimony at prior trial, ending in mistrial, as to adverse claimant's efforts "to purchase the land" from the record owner, was admissible in subsequent trial "as an admission against interest"). *See also* Magelssen v. Atwill, 152 Mont. 409, 451 P.2d 103 (1969) (adverse claimant sent true owner a letter acknowledging the latter's superior title and asking if he "desired to sell"); Beaver v. Davis, 275 Ore. 209, 550 P.2d 428 (1976) (adverse claimants admitted "that they approached plaintiff [true owner] regarding the purchase of the property").

Cf. Brylinski v. Cooper, 95 N.M. 580, 624 P.2d 522 (1981) (dictum that an offer (or contract) to purchase an outstanding title does not interrupt the continuity of an adverse possession because it is not an "acknowledgment of a superior title"), *cited in Adverse Possession, supra* note 1, at 346 n.65.

163. *See, e.g., Adverse Possession, supra* note 1, at 346 n.65: Campano v. Scherer, 49 A.D.2d 642, 370 N.Y.S.2d 237 (1975) ("Acknowledgement" of true owner's superior title was coupled with "preparation of a sales agreement;" this constituted a "recognition of the true owner's title and prevents adverse possession from accruing."); McDonald v. Batson, 501 S.W.2d 449 (Tex. Civ. App. 1973) (acknowledgement of true owner's title before statutory period expires will defeat claim of title by adverse possession; acknowledgement thereafter will not defeat the claim as a matter of law, but "it is evidence tending to show the possession was not adverse"). *See also* Magelssen v. Atwill, 152 Mont. 409, 451 P.2d 103 (1969).

164. *See, e.g.,* Hungerford v. Hungerford, 234 Md. 338, 199 A.2d 209 (1964) (adverse claimant in possession under unenforceable oral contract to purchase); Tindle v. Linville, 512 P.2d 176 (Okla. 1973) ("permissive" from the beginning); Spinks v. Estes, 546 S.W.2d 390 (Tex. Civ. App. 1977) (express "permission to use the land for pasture purposes" at the beginning); all *cited in Adverse Possession, supra* note 1, at 346 n.65.

165. *See, e.g.,* Davis v. Mayweather, 255 Ark. 966, 504 S.W.2d 741 (1974); Dunlop v. Twin Beach Park Ass'n, 111 Mich. App. 261, 314 N.W.2d 578 (1982) (semble).

support Professor Helmholz's argument as to the fatal effect of evidence that the adverse claimant possessed in "bad faith."

Following his discussion of "offer to purchase" cases, Professor Helmholz quotes snippets from three other cases to support his assertion that when the courts "encounter the actual bad faith claimant, they have been hesitant to favor his claim."[166] One of these cases, *Carpenter v. Ruperto*,[167] simply applied the well-settled Iowa rule requiring "good faith" on the adverse claimant's part. Neither of the other two cases supports Professor Helmholz's assertion when the opinions are read in their entirety. Professor Helmholz states that in *Sandy Ford Ranch, Inc. v. Dill*[168] "the record owner's lawyer was allowed to argue to a jury that the adverse possessor 'reminded him of a vulture watching for its prey.' "[169] But this does not, as Professor Helmholz asserts, indicate any judicial disfavor toward "bad faith" adverse claimants when *Sandy Ford Ranch* is carefully examined. The claimant's attorney failed to object to the opposing attorney's argument and thus could not preserve any objection for appellate review. Hence the only basis for appellate court consideration of the argument in question was a court rule "permitting reversal and remand for plain errors affecting substantial rights when the court deems that manifest injustice or miscarriage of justice has resulted therefrom."[170] The court stated that the language in question was not "manifestly inflammatory" and "could not confidently be said" to have "improperly influenced the jury to an unjust result" or to have "deprived the plaintiff [adverse claimant] of a fair trial in a simple case involving simple issues,"[171] and therefore refused to reverse the judgment.

In *Hansen v. Pratt*,[172] from which Professor Helmholz quotes a statement that "[a] willful trespasser is hardly in a position to assert equitable rights,"[173] there was no adverse possession issue at all. The record owner sued to compel the defendants to remove a part of their driveway that encroached on plaintiffs' land and the defendants sought to compel plaintiffs to convey the land in question to them "for adequate compensation." The defendants' counterclaim was obviously "equitable" in nature, and

166. *See Adverse Possession, supra* note 1, at 347.
167. 315 N.W.2d 782 (Iowa 1982). *See also supra* notes 143-45 and accompanying text.
168. 449 S.W.2d 1 (Mo. 1970).
169. *See Adverse Possession, supra* note 1, at 347 n.66.
170. 449 S.W.2d at 7.
171. *Id.*
172. 240 Ark. 746, 402 S.W.2d 108 (1966).
173. *See Adverse Possession, supra* note 1, at 347 n.68.

the court was justified in refusing relief because the evidence showed that there was no mutual mistake as to location of the boundary between the lands of the parties and that defendants knew the driveway as constructed "encroached several feet over the line."[174] The *Hanson* case thus has no apparent relevance to the law of adverse possession.

3. *Cases in Which an Adverse Claimant Succeeded*

Professor Helmholz concludes the section of his article dealing with the relevance of "bad faith" by considering a group of cases in which adverse claimants were held to have acquired title by adverse possession *despite* the fact that they "knew, or should have known, that the land in question belonged to someone else."[175] He conceded that these cases "are consistent with the principle that the state of mind of the possessor is irrelevant,"[176] but he suggested that "in these cases," with a few exceptions, "the courts were as influenced by the equities favoring the claimant, as they were by the doctrine that the possessor's state of mind is irrelevant."[177] Because Professor Helmholz was discussing the relevance of "bad faith" and not the more general issue whether "claim of right" is to be given a subjective meaning, the reader is entitled to conclude that Professor Helmholz really thinks that in the cited cases the courts weighed the "equities" of the "bad faith" adverse claimant against those of the true owner and concluded that the former were stronger. But a

174. 240 Ark. at 749-50, 402 S.W.2d at 110.

175. *See Adverse Possession, supra* note 1, at 347-48 nn.69-74.

176. *See Adverse Possession, supra* note 1, at 347.

177. *See id.* at 347-48 nn.69-72, *citing* Peters v. Juneau-Douglas Girl Scout Council, 519 P.2d 826 (Alaska 1974) (adverse claimant proved "exclusive" and "hostile" possession for statutory period); Phoenix Jewish Community Council v. Leon, 102 Ariz. 187, 427 P.2d 138 (1967) (possession became "adverse," although "permissive" at inception because adverse claimant was contract vendee); Lobro v. Watson, 42 Cal. App. 3d 180, 116 Cal. Rptr. 533 (1974) (possession "adverse," although true owner was unaware of his own right to land, if possession "was such as to constitute reasonable notice that the possessor claimed the land as his own"; no fiduciary relationship between adverse claimant and his deceased brother-in-law's wife); Ruick v. Twarkins, 171 Conn. 149, 367 A.2d 1380 (1976) (adverse claimant was cotenant of father of other parties, but had clearly "excluded" them); Guizy v. Kratz, 28 Ill. App. 3d 500, 328 N.E.2d 699 (1975) (possession "adverse" though opposing parties were cotenants); Kevil v. Casey, 459 S.W.2d 84 (Ky. App. 1970) (even if parol gift of land did not provide basis for adverse possession against "donor," it would have some bearing on "hostility" of possession as against members of family who knew of adverse claim of "donees"); Olson v. Nordan, 6 Mich. App. 132, 148 N.W.2d 528 (1967) (possession "adverse" although claimant was father of record owner when possession began); Teeples v. Key, 500 S.W.2d 452 (Tenn. Ct. App. 1973) (possession "adverse" although claimant was husband of record owner when possession began); Junkerman v. Carruth, 620 S.W.2d 165 (Tex. Civ. App. 1981) (possession adverse although claimant was tenant of record owner when possession began).

careful reading of these cases reveals no substantial basis for such a conclusion. In none of the cases did the court intimate that the adverse claimant's "bad faith," absent countervailing "equities," would have led to rejection of his claim of title by adverse possession.[178] Professor Helmholz's suggestion that this would have been the result is based on mere speculation. On the other hand, the prevailing rule that the adverse claimant's "good faith" or "bad faith" is irrelevant is emphatically stated in several of the cases[179]—including one in which the successful adverse claimant was said to have acted "fraudulently" as well as in "bad faith."[180]

IV. CASES INVOLVING SPECIAL SITUATIONS

Under this heading Professor Helmholz discusses a large group of recent cases that concededly do not "fit" comfortably into his general argument as to the relevance of "good faith" and "bad faith." This article will now consider these cases under the sub-headings Professor Helmholz used.

A. Tax Sale Cases[181]

As Professor Helmholz recognized, when an adverse claimant holds

178. None of the courts in the cited case made "good faith" or "bad faith" an issue, and in most of the cases it was not even mentioned. As indicated at *supra* note 177, the issue in several cases was whether an initially "permissive"—and therefore "rightful"—possession had become "adverse" so as to allow the statutory limitation period to run. In two cases, the "exclusivity" of the adverse claimant's possession was in issue. In one case, the issue was whether the true owner's ignorance of his rights in the land precluded "adverse" possession.

179. *See* Peters v. Juneau-Douglas Girl Scout Council, 519 P.2d 826, 832 (Alaska 1974) ("The question is whether or not the claimant acted toward the land as if he owned it. His beliefs as to the true legal ownership of the land, his good faith or bad faith in entering into possession (*i.e.*, whether he claimed a legal right to enter, or avowed himself a wrongdoer), are all irrelevant."); Ruick v. Twarkins, 171 Conn. 149, 158, 367 A.2d 1380, 1385 (1976) ("[T]itle may be acquired even though the possessor knows that he is occupying wholly without right; all that is necessary to prove is that there was a user as of right, that is, one in disregard of any rights of the holder of the legal title," (*quoting* Horowitz v. F.E. Spencer Co., 132 Conn. 373, 378, 44 A.2d 702, 705 (1945)).

180. *See* Ruick v. Twarkins, 171 Conn. 149, 157, 267 A.2d 1380, 1384 (1976) ("The defendant's contention that the probate decree, void because obtained [by the adverse claimant] by fraud, may not furnish proof of the elements of ouster and claim of right against the cotenants is without merit.").

181. This sub-heading is something of a misnomer, because Professor Helmholz only discusses cases in which the adverse claimant held under a defective tax *deed*; no consideration is given to cases in which the adverse claimant held under a tax sale *certificate* which, rather than the subsequently issued tax deed, vested title in the tax sale purchaser under state law. *See* Annot. 38 A.L.R.2d 986, 1087-88 (1954).

under "color of title" and seeks the benefit of a shorter limitation period or seeks to extend his possession "constructively" to land not actually possessed, either express statutory language or case law requires "good faith" in many jurisdictions.[182] The cases applying this requirement when the "color of title" consists of a defective tax deed raise no special issues,[183] and it is unclear why Professor Helmholz devoted almost two pages of his article to these cases. The first cited case[184] is said to show that Illinois requires "good faith" in defective tax deed cases when the adverse claimant relies on the deed as "color of title" sufficient to give him the benefit of a short statutory limitation period. But the applicable Illinois statutory "color of title" section expressly requires "good faith,"[185] and the case simply interprets "good faith" as requiring the holder of the tax deed to make "diligent inquiry" to locate and notify the owners of the land of his purchase of the land at the tax sale.[186] None of the other cited cases is relevant to Professor Helmholz's argument.[187]

182. *See Adverse Possession, supra* note 1, at 337 nn.21-23. *See also supra* note 80 and accompanying text.

183. For a thorough discussion of the defective tax deed cases, see Annot. 38 A.L.R.2d 986 (1954).

184. Payne v. Williams, 91 Ill. App. 3d 336, 46 Ill. Dec. 783, 414 N.E.2d 836 (1980).

185. ILL. ANN. STAT. ch. 83, § 6 (1966).

186. The court stated that the failure to make "diligent inquiry," required by statute before a tax deed could be obtained, not only made the tax deed void, but also meant that the tax deed was "fraudulently obtained," and hence that it could not "constitute color of title." *See* 91 Ill. App. 2d at 343, 414 N.E.2d at 841. In some states, a defective tax deed may constitute "color of title" even if it is "void on its face," provided it contains a description sufficient for indentification of the land and location of its boundaries. In other states, courts have held that a tax deed "void on its face" can never constitute "color of title." *See* Annot. 28 A.L.R.2d 986, 1023 (1954).

One should note that the property involved in *Payne* was a severed "mineral estate" that the plaintiffs had never actually possessed. This provided another reason why they could not prevail under ILL. ANN. STAT. ch. 83, § 6 (1966). Nor could they prevail under *id.* § 7, which applies to vacant lands and does not expressly require the claimant under "color of title" to be in possession, because the Illinois courts have required the claimant of a severed "mineral estate" to show actual possession before he can prevail. The rationale seems to be that, absent the claimant's actual possession, the record owner of the mineral estate is "constructively" in possession, so that the mineral estate does not constitute "vacant lands." Lack of actual possession also precluded the plaintiff in *Payne* from acquiring title by adverse possession under the general 20-year statute of limitation.

187. *See Adverse Possession, supra* note 1, at 350 n.80, *citing*: English v. Brantley, 361 So. 2d 549 (Ala. 1978) (tax sale purchaser who never obtained a tax deed had no "color of title" as defined by statute; he nevertheless obtained title under short 3-year limitation period provided in ALA. CODE § 40-10-82 (1975)); Stolz v. Maloney, 129 Ariz. 264, 630 P.2d 560 (Ct. App. 1981) (acquisition of valid tax deed is not "ouster" of non-occupying cotenants so as to make occupying cotenant's possession "adverse"); Nicholas v. Giles, 102 Ariz. 130, 426 P.2d 398 (1967) (defective tax deed, standing alone, was not "color of title" because the Arizona statute defined "color of title" as "a constructive chain of transfers" containing formal defects only; but the deed was effective to give an adverse

According to Professor Helmholz the last case cited in this section, *Brylinski v. Cooper*,[188] states that "the tax deed stands lower than a deed *inter partes* for adverse possession purposes," but does give the purchaser more rights than "mere squatters or those who seek to aggrandize their holdings by appropriation."[189] However, this is not what the *Brylinski* opinion states, and the quoted snippet creates a totally misleading impression. What *Brylinski* actually states is as follows:[190]

> The color of title requirement [applicable in New Mexico to all adverse possession cases] protects landowners from the unjust use of the doctrine of adverse possession by mere squatters or those who seek to aggrandize their holdings by appropriation. . . . We are mindful that the test of the validity of a deed is stricter for a tax deed than for a deed *inter partes*. This is so that (1) the owner may have information of the claim made upon his property; (2) the public may be notified what property is offered for sale; and (3) the purchaser may obtain a sufficient conveyance.
>
> We feel, however, that his doctrine has no application to the color of title requirement because the interests of the assessed owner, the public, and the purchaser are adequately served by compliance with all elements of the doctrine of adverse possession. A landowner might fairly complain where his land is sold following an improper assessment. But he has no just cause for complaint where the purchaser has openly possessed the property under color of title for the prescriptive period and paid taxes thereon.

When accurately quoted, this passage makes it clear that the New Mexico court carefully distinguished between the strict requirements for a valid tax sale and the issuance of a valid tax deed and the less strict requirements for establishing an effective adverse possession under an invalid tax deed relied upon to satisfy the New Mexico statutory requirement that every adverse possession be under "color of title." In fact, the court held that although insufficiency of the land description in the assessment and in the tax deed made the deed invalid, it could serve as "color of title" if the description in the tax deed, when aided by extrinsic

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claimant title under a statute requiring 5 years' possession under a "recorded deed"); Horn v. Blaney, 268 Ark. 885, 597 S.W.2d 109 (Ct. App. 1980) (tax sale void because the United States owned the land at time of sale, but tax deed was "color of title"); Ates v. Yellow Pine Land Co., 310 So. 2d 772, 774 (Fla. Dist. Ct. App.) ("A tax deed, whether valid or invalid, is color of title.") *cert. denied*, 321 So. 2d 76 (Fla. 1975); Brylinski v. Cooper, 95 N.M. 580, 624 P.2d 522 (1981), *cited in Adverse Possession, supra* note 1, at 351 n.81. *See also infra* note 188 and accompanying text.

188. 95 N.M. 580, 624 P.2d 522 (1981).

189. *See Adverse Possession, supra* note 1, at 351. Professor Helmholz purported to paraphrase the court's language, along with a quoted snippet from the opinion.

190. 95 N.M. at 584, 624 P.2d at 526.

evidence, "is sufficient to identify the property in dispute."[191] Nothing in the opinion remotely suggests that "the tax deed stands lower than a deed *inter partes* for adverse possession purposes."

B. Cases In Which A Grantor Retains Possession

Professor Helmholz states that he has "conceptual problems" with the recent adverse possession cases in which a grantor retained possession after making an effective conveyance of land. In these cases, the grantor's possession is generally presumed to be "permissive," and the presumption[192] can be rebutted only by "unequivocally hostile acts" of the grantor. On one hand, Professor Helmholz argues, "the strength of the presumption is scarcely comprehensible if one takes a pure possession approach" to adverse possession, but on the other, he concedes "the situation also fits uncomfortably with a good faith test" because "if the law permits him [the grantor] to acquire title by adverse possession by acts of actual hostility, . . . the law must be allowing an advantage to one who possesses in bad faith."[193] He then attempts to minimize the importance of this apparent judicial rejection of any "good faith test" by pointing out that "most of the only cases decided in favor of the grantor-possessor have been mistake cases, that is, cases where the grantor, and usually the grantee as well, believed that the deed did not cover the land in dispute" and, therefore, "no bad faith exists."[194]

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191. *Id.* at 583, 584, 624 P.2d at 525, 526.

192. *Adverse Possession, supra* note 1, at 351. *See also id.* at 352, where Professor Helmholz states that "[w]here the grantor continues in possession, the same external acts of ownership (*e.g.*, cultivation, improvements, payment of taxes) are uniformly held to be insufficient notice of a claim to constitute hostility." *Id.* In some of the cases cited, *id.* at 352 n.83, a family relationship between grantor and grantee, or concurrent possession by grantor and grantee, or the existence of concurrent ownership between grantor and grantee strengthened the presumption. *See* Wojahn v. Johnson, 297 N.W.2d 298 (Minn. 1980); Toxcano v. Delgado, 506 S.W.2d 317 (Tex. Civ. App. 1974); Petty v. Dunn, 419 S.W.2d 417 (Tex. Civ. App. 1967).

In Brown v. Brown, 361 So. 2d 1038 (Ala. 1978), the decision went too far in applying the presumption, because the grantee had returned the deeds to the grantor and the conveyance seems to have been a "sham," with the grantee serving only as a "straw man." In McClellan v. King, 133 Ill. App. 2d 914, 273 N.E.2d 696 (1971), proof that the grantee had begun an earlier action to enjoin the grantor's use of the land, which was dismissed for failure to prosecute the action, rebutted the presumption. This, the court held, made the continuing possession of the grantor "hostile." Jones v. Brown, 242 Ark. 537, 414 S.W.2d 618 (1967), was decided in part by application of the rule that long-continuing possession by the grantor (15 years) would "rebut the presumption that continued possession by a grantor of land deeded to a grantee is subordinate to the title of the grantee." *Id.* at 541, 414 S.W.2d at 620.

193. *Adverse Possession, supra* note 1, at 351-52.

194. *Id.*

I do not agree that the strength of the presumption of "permissiveness" in cases in which a grantor retains possession of land after he conveys it is "incomprehensible." The presumption is based in part, as Professor Helmholz recognizes, on the same policy that underlies the doctrine of "estoppel by deed," that is, "the principle that a grantor should not in fairness be allowed to claim in derogation of his own deed."[195] Perhaps Professor Helmholz's conceptual difficulties with the retained possession cases are caused by his failure to distinguish three quite different fact situations. In the first situation, the grantor and grantee are "strangers" dealing with each other at arm's length; the grantee pays a fair price for the land; and the grantor retains possession of the entire tract conveyed. In the second situation, the grantor and grantee are related by blood or marriage and are not dealing at arm's length; the conveyance is often gratuitous; and the grantor retains possession of the entire tract conveyed. In the third situation, the land in dispute is a strip located on one edge of the land conveyed and contiguous to other land the grantor owns that was not included in the conveyance, and the grantor mistakenly thinks that the disputed strip of land was not included in the conveyance. In the third situation, the mistake often stems from the existence of a fence that is thought to mark the boundary of the land conveyed but is actually located inside that boundary.

In the first situation, the policy against allowing a grantor to "derogate from his grant" has a strong basis. Moreover, it is reasonable to infer that actual permission for the grantor's retention of possession was obtained from the grantee because otherwise the conduct of the parties is incomprehensible.[196] Hence the courts have required proof of "unequivocally hostile acts" before the grantor's retained possession will be deemed adverse to the grantee. However, since any inference of actual permission becomes less reasonable as time passes, it has been held that the grantor's retention of possession for a long time destroys the presumption that the grantor's possession is "permissive."[197]

195. *See Adverse Possession, supra* note 1, at 351. The underlying policy is applicable whether or not the deed contains a covenant for quiet enjoyment and/or a covenant of warranty. When the deed contains such a covenant, the grantor's adverse possession would, of course, amount to a breach of the covenant.

196. The grantee would normally take possession of the land in such a case unless there were an agreement to permit the grantor to retain possession as a tenant of some kind. The grantee sometimes gives the grantor a written lease, but the grantee's oral permission for the grantor to continue in possession will make the latter a tenant at will.

197. *See, e.g.*, Brinkman v. Jones, 44 Wis. 498, 525 (1878) ("when the possession has been for a

In the second situation, the policy against allowing a grantor to "derogate from his grant" may be weaker, especially if the conveyance is gratuitous; but the relationship between the parties provides a separate basis for presuming that the grantor's retention of possession was with the grantee's permission. Several of the cases Professor Helmholz cites involved this second fact situation and resulted in holdings that the grantor's possession was not "hostile" to the grantee.[198]

In the third fact situation, if the cases Professor Helmholz cites are an accurate guide, the courts generally do not recognize any presumption that the grantor's possession is "permissive" in "mistaken boundary" cases.[199] Although his conclusion is ambiguous, Professor Helmholz apparently thinks that the explanation for these cases, which represent an exception to the general rule applied when a grantor retains land effectively conveyed to another, is that the courts favor the "good faith" adverse claimant. It is more likely, however, that the cases allowing the grantor to acquire title to a strip of land retained in his possession because of a mistake as to the boundary of the land conveyed are based on

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long period, the presumption of a claim of right hostile to the title granted does arise in every case where such possession is inconsistent with the rights of the grantee, and . . . in such case a court or jury might find the possession adverse from the nature of the possession, without proof of an express declaration on the part of the occupant that he claimed to hold in hostility to the grant").

198. *See, e.g.*, Wojahn v. Johnson, 297 N.W.2d 298 (Minn. 1980). Even in this fact situation, the grantor's long-continued possession, in excess of the statutory limitation period, has been held to "overcome" the presumption. *See also* Jones v. Brown, 242 Ark. 537, 414 S.W.2d 618 (1967) (statutory limitation period was 15 years); Haller v. Haller, 225 Ark. 882, 286 S.W.2d 331 (1956) (possession for 30 years; statutory limitation period was 7 years).

199. *See* Jones v. Brown, 242 Ark. 537, 414 S.W.2d 618 (1967); McClellan v. King, 133 Ill. App. 2d 914, 273 N.E.2d 696 (1971) (semble); Colley v. Carpenter, 172 Ind. App. 638, 362 N.E.2d 163 (1977) (semble); Rider v. Pottratz, 246 Or. 454, 455, 425 P.2d 766, 767 (1967) ("presumption of subservient holding has no basis in fact when the grantor's possession is continued under the belief, mistaken though it be, that the area in question was not included in the grant"); Darling v. Ennis, 138 Vt. 311, 315, 415 A.2d 228, 231 (1980) ("presumption that the grantor's rights are subordinate to the grantee's rights has no room for operation when the grantor believes, however mistakenly, that the disputed property was not included in the grant"); Lindl v. Ozanne, 85 Wis. 2d 424, 431, 270 N.W.2d 249, 253 (App. 1978) (*quoting Rider*).

In *Rider*, the court relied on the following statement from Stockwell v. Gibbons, 58 Wash. 2d 391, 396, 363 P.2d 111, 114 (1961):

> This exception applies in those cases in which the grantor gives up possession of the major part of the property conveyed but remains in possession of a portion of it under the mistaken belief that it was not conveyed. Under such facts there is no validity to the assumption, upon which the general rule is based, that the grantor remains in possession permissively under the grantee.

Accord Robinson v. Douglass, 2 Aik. 364, 367 (Vt. 1827).

All of these cases are from jurisdictions that have adopted the "Connecticut rule" with respect to "mistaken boundary" cases.

(1) a belief that the policy basis of the presumption that the grantor's possession is "permissive" is weak when he retains only a small part of the land conveyed, and (2) a desire to apply the "Connecticut rule" in all "mistaken boundary" cases. None of the cases suggests that "good faith" is a factor that favors the adverse claimant. The only way to test Professor Helmholz's conclusion would be to find cases in which the grantor retained only a small part of the land covered by his deed and was shown to have acted in "bad faith." Research has revealed no such cases.

C. Cases Involving Cotenants

In the group of cases involving cotenants, the courts have almost uniformly held that "[o]nly where the cotenant in possession ousts his fellow, or . . . repudiates the cotenancy by acts or words which give notice of his intention to claim sole ownership, can there be a possibility of adverse possession."[200] The reason for such holdings is obvious; absent "ouster," "exclusion," or "repudiation," the sole possession of one cotenant is not wrongful as against other cotenants who do not choose to assert their concurrent right of possession, and the latter have no cause of action against the occupying cotenant. It is unnecessary to advert to the relationship of "trust and confidence" between cotenants[201]—a relationship that is crucial when the courts deal with cases in which one cotenant has acquired an outstanding title or interest and seeks to assert it to the prejudice of the other cotenants. Judicial opinions generally do not suggest that the "good faith" or "bad faith" of the occupying cotenant has any relevance on the issue of adverse possession. The real problem in the cotenancy cases is to determine what conduct by the occupying cotenant will amount to an "ouster" or "exclusion" of the other cotenants, or to a "repudiation" of their rights, so as to make the occupying cotenant's possession "adverse."

It is true, as Professor Helmholz states, that merely "behaving like the sole owner" will not ordinarily be sufficient to make the occupying cotenant's possession "adverse"; there must be an "exclusion," "ouster" or "repudiation."[202] However, the cases Professor Helmholz surveyed in-

200. *Adverse Possession, supra* note 1, at 353.

201. *Id.*

202. *See Adverse Possession, supra* note 1, at 354 (citing cases holding that "[s]ole possession, even when coupled with the 'payment of mortgage and taxes, [the] effecting [of] major improvements and repairs, [and the] leasing out and keeping [of] the rents, issues and profits' is generally held to be

cluded a fair number in which the court did rule in favor of the occupying cotenant. Professor Helmholz asserts that there are a larger number of favorable rulings "than is consistent with the conclusiveness of the rule,"[203] that is, with the strong presumption that the sole possession of one cotenant is not "adverse" to the others. But the basis for this judgment is not clear. In any case, his conclusion that the cases holding in favor of occupying cotenants are strongly influenced by the presence or absence of "good faith" on the part of the latter is significant only if the cases he cites in fact support the conclusion. These cases are of three types:[204] (1) cases in which siblings (either actual or prospective cotenants) "make an oral agreement or reach a 'family understanding' to the effect that one of them will be entitled to the land"; (2) cases in which the occupying cotenant purported to convey sole ownership in severalty to a stranger who, although negligent in failing to examine the grantor's title, nevertheless believed that he was acquiring sole ownership of the land; and (3) cases in which the other cotenants "allow one of their number to go into possession, to pay all taxes, to make improvements to the property and in fact to become generally known as the owner," and "do nothing until after many years go by." The first and second types of cases may, of course, overlap.

1. "Oral Agreement" and "Family Understanding" Cases

In cases in which the occupying cotenant is obviously acting in "good faith," Professor Helmolz suggests that the cases holding that the occupying cotenant has acquired title by adverse possession are really based on the "equities" of the occupying cotenant, although the courts purportedly "will reach the result by holding that the 'hostile' possession began on the date of the oral grant or the 'family understanding.' "[205] His reference to "equities" presumably indicates that the facts are such as to raise an "equitable estoppel" against assertion of the strict "legal" rights of the non-occupying cotenants. To the extent that the courts do in fact rely on "equitable estoppel" as the basis of their decision, it is obvious that the cotenants must show "justifiable" or "good faith" reliance on the representations or promises of the other cotenants. But no clear ration-

insufficient" to prove "hostility" against the other cotenants). For an exhaustive citation of cases to the same effect, see 4 H. TIFFANY, *supra* note 7, at § 1155.

203. *Adverse Possession, supra* note 1, at 354.

204. *Id.* at 354-56.

205. *Id.* at 355.

ale emerges from an examination of these cases, each of which seems to have been decided on the basis of its own peculiar facts.

In *Bayless v. Alexander*,[206] for example, the original occupying cotenant received a quitclaim deed that was intended to convey the expectancies of his siblings, but was ineffective to convey the expectancy of one sibling who predeceased the parent, and whose heirs later sought to assert rights as cotenants against the grantee's widow. The court held that the grantee's sole possession after the parent's death was not "adverse," because there was "no evidence of actual notice" to the other cotenants that he "claimed in the entirety"; but the court further held that the widow's possession was "adverse" by virtue of a well-settled rule that "entry of an heir into the possession of property with a notorious claim of exclusive right may disseize the other heirs, his cotenants."[207] The court stated that "[t]he fiduciary relationship presumed to exist between cotenants . . . has no application here, since the circumstances surrounding the appellee's acquisition of title completely negates any such relation, to the extent that we conclude it was the equivalent of an ouster of the other cotenants."[208] It was probably true that the widow believed in "good faith," that she had acquired sole ownership by virtue of the quitclaim deed to her husband—which makes the case, in substance, a type-(2) case rather than a type-(1) case—but the court does not appear to have considered her "good faith" significant. Nothing in the opinion indicates that the court was disingenuous in invoking the rule that entry with a notorious claim of exclusive right may disseize the other cotenants.

In *Cash v. Gilbreath*,[209] siblings attempted to quitclaim their expectancies to one of their number during their parent's lifetime. The deed was held to be ineffective, but the court also held that it constituted a strong basis for concluding that the grantee's sole possession was "adverse," especially after it was recorded. Far from relying on the occupying claimant's "good faith," the court was anxious to point out that "good faith" was not fatal to a claim of title by adverse possession. The court stated, "The possessor need not intend to take away from the true owner something which he knows belongs to another, or even that he be indifferent

206. 245 So. 2d 17 (Miss. 1971), *cited in Adverse Possession, supra* note 1, at 355 n.92.

207. 245 So. 2d at 21.

208. *Id.*

209. 507 S.W.2d 931 (Mo. App. 1974), *cited in Adverse Possession, supra* note 1, at 355 n.92.

as to the facts of the legal title."[210]

In *Foss v. Paulson*,[211] it was unclear whether the nonoccupying cotenant had effectively quitclaimed her interest to her cotenant (her husband) or whether her cotenant's administrator, acting on behalf of her cotenant's sole heir, had wrongfully ousted her. Under the first alternative, her cotenant was the sole owner at the time of his death, and his sole heir necessarily became sole owner. Under the second alternative, the possession of her cotenant's sole heir was obviously "adverse" to the non-occupying cotenant.

The occupying cotenant in *Petrusic v. Carson*,[212] obtained a deed from another cotenant, apparently relying on a probate decree awarding sole ownership to her, and thereafter maintained sole possession for some thirty-seven years before the institution of the suit. Under the circumstances, the court held there was "sufficient" notice to the cotenants out of possession, that the occupying cotenant was holding adversely, "if they had paid proper attention to their rights."[213] This case seems to be a hybrid of the second and third types that Professor Helmholz sets out. The court devoted almost the entire opinion to discussion of the "notice" issue, and was apparently unimpressed by the occupying cotenant's "equities."

Before considering the second group of cases, one should note that any oral agreement or understanding between the occupying cotenant and other cotenants to the effect that he shall "be entitled to the land," or any oral agreement with the sole owner that one of several potential heirs shall be "entitled to the land" should result in the court's treating the occupying cotenant's possession as "adverse" from its inception because the possession is clearly under a "claim of right" and the other cotenants are aware of the occupying cotenant's claim. The situation is essentially like that resulting from an ancestor's attempt to make a "parol gift" of land to one of his potential heirs.[214]

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210. 507 S.W.2d at 934.

211. 255 Or. 167, 465 P.2d 221 (1970), *cited in Adverse Possession, supra* note 1, at 355 n.92.

212. 496 P.2d 70 (Wyo. 1972), *cited in Adverse Possession, supra* note 1, at 355 n.92.

213. 496 P.2d at 74.

214. For a case holding the grantee's possession under an attempted "parol gift" to be "adverse", see Nevells v. Carter, 122 Me. 81, 119 A. 62 (1922). To be adverse, however, the claimant must have an honest belief that the parol gift was legally effective. O'Boyle v. Kelley, 249 Pa. 13, 94 A. 448 (1915). Some courts apparently hold the possession not to be adverse if the parol gift is "conditional" or "executory" (*i.e.*, not to be "absolute" until the donee has fully performed some agree-

2. *Cases in Which a Sole Possessor is a Grantee Who is not Aware that He is a Cotenant*

In cases of the second type, courts have long recognized that the sole possession of the grantee who obtains a deed purporting to convey sole ownership to him should be deemed "adverse" from its inception.[215] As Professor Tiffany points out, any other cotenant

> is charged with notice of the fact that a person other than his original cotenant is in possession of the land, and he is also charged with notice of the character of the claim of such person, and cannot assume that it is other than such as is indicated by the conveyance under which he holds.[216]

Cases from almost all jurisdictions support this rule,[217] although only one of the three cases cited by Professor Helmholz purported to apply the rule.[218] The reason for the rule is that the nonoccupying cotenants are charged with notice of the nature of the claim of the original occupying cotenant's grantee—not that the grantee honestly believes that he has acquired sole ownership. None of the cases cited by Professor Helmholz indicates that the grantee's "good faith" or lack of "good faith" is relevant.

3. *Cases in Which the Occupying Cotenant's Possession Continues for a Very Long Time*

Professor Helmholz asserts that, in cases of long-continued occupation by one cotenant accompanied by owner-like conduct, the courts "sometimes find that the possessor has been in possession with implied hostility and award him title," although under the generally applicable rule the

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ment, such as an agreement to take care of the donor during his lifetime). *See* Kevil v. Casey, 459 S.W.2d 84 (Ky. Ct. App. 1970).

215. *See* 4 H. TIFFANY, *supra* note 7, at § 1185, at 945-46.

216. *Id.*

> If, however, the conveyance purports to be, not of the entire interest in the property, but of the interest of the grantor merely, the possession of the grantee is prima facie like that of his grantor, that of a cotenant only, and not adverse to the other cotenant, and the latter is justified in assuming this to be the case.

217. *See* 4 H. TIFFANY, *supra* note 7, § 1185 at 932 n.35.

218. *See Adverse Possession, supra* note 1, at 355 n.93. The court applied the rule in Hardy v. Lynch, 258 So. 2d 414 (Miss. 1972), in which the rule seems to be limited by a requirement that the deed under which the occupying cotenant claims must be recorded. Neither Collier v. Welker, 19 N.C. App. 617, 199 S.E.2d 691 (1973), nor Hill v. Hill, 55 Tenn. App. 589, 403 S.W.2d 769 (1965), recognized or applied the rule. Both cases, instead, relied on the stated rule that an occupying cotenant may acquire a "prescriptive title" by 20 years of sole and uninterrupted possession, "independent of the statute of limitations." As to "prescriptive title," *see supra* notes 12-22 and accompanying text.

non-occupying cotenants "should be able to count on the presumption that the possession of the cotenant on the land is consistent with their rights."[219] There are, indeed, many cases holding the occupying cotenant's possession to be adverse when it has continued for a very long time (*e.g.*, from twenty to forty years) even though he has never done anything more than behave as if he were the sole owner.[220] As stated by Tiffany, the rationale of these cases is that "men do not ordinarily sleep on their rights for so long a period, and a strong presumption arises that actual proof of the original ouster has become lost by lapse of time."[221] Professor Helmholz, however, believes that "equitable" factors explain the results.[222] Unfortunately, only one of the cases he cites supports his belief.[223] In two of the cited cases, the occupying tenant took possession in reliance on a written instrument that, although void, purported to vest him with sole ownership, and the possession was therefore clearly "adverse."[224] Two of the cases Professor Helmholz cited held that an occupying cotenant's long-continued and uninterrupted possession creates a "title by prescription."[225] None of these cases suggests that the court was basing its decision on the "equities" of the occupying cotenant. One case expressly relies on a "presumption of ouster" and also states that "[t]he rule of presumption of rightful possession after 20 years is designed 'to prevent stale demands' from those who have slept on their rights for so long a period and 'to protect possessors from the loss of

219. *Adverse Possession, supra* note 1, at 356.

220. *See* 4 H. TIFFANY, *supra* note 7, § 1185, at 937-38 n.9.

221. *Id.* at 930. Petrusic v. Carson, 496 P.2d 70 (Wyo. 1972), could be explained on this ground, because the sole possession of the occupying cotenant lasted for 37 years before her possession was challenged in court.

222. *See supra* note 205.

223. Guinzy v. Kratz, 28 Ill. App. 3d 500, 328 N.E.2d 699 (1975), *cited in Adverse Possession, supra* note 1, at 356 n.95.

224. Ruick v. Twarkins, 171 Conn. 149, 367 A.2d 1380 (1976) (fraudulently obtained probate decree); *cited in Adverse Possession, supra* note 1, at 356 n.95; Caywood v. January, 455 P.2d 49 (Okla. 1969) (deed executed by Indian void because neither Secretary of Interior nor county court approved), *cited in Adverse Possession, supra* note 1, at 356 n.95.

225. *See* Morgan v. Dillard, 61 Tenn. App. 519, 456 S.W.2d 359 (1970), *cited in Adverse Possession, supra* note 1, at 356 n.95; Hill v. Hill, 55 Tenn. App. 589, 403 S.W.2d 769 (1966), *cited in Adverse Possession, supra* note 1, at 355 n.93. In *Hill*, the court stated that the presumption on which the "prescriptive title" is based "arises independent of the statute of limitations." 55 Tenn. App. at 616, 403 S.W.2d at 781. The prescriptive period in Tennessee is 20 years, while the statutory limitation period is 7 years. *See* TENN. CODE ANN. § 28-2-103 (1980). The doctrine of "prescription" based on a "presumed grant," as applied to corporeal interests in land, is discussed *supra* notes 12-22 and accompanying text.

evidence from lapse of time.' "[226]

Finally, with respect to Professor Helmholz's statement that "most cotenants who successfully claim title after possession for the statutory period have held the land in the honest belief that they had a right to the fee simple" in severalty,[227] one must recognize that a cotenant will seldom, if ever, deliberately undertake in "bad faith" to acquire, by adverse possession, sole ownership of land held in cotenancy. Hence, in the great majority of cases, the occupying cotenant will necessarily have been in possession in the "honest belief" that he is the sole owner of the land. This is true whether or not the occupying cotenant ultimately succeeds in establishing ownership by adverse possession. Thus the fact that the occupying possessor acted in "good faith" in most of the cases in which he succeeded in acquiring title by adverse possession does not demonstrate that "good faith" is either a necessary or material factor in judicial decisions on the point, or that "bad faith" would prove fatal to an adverse claimant's effort to acquire title by adverse possession.

V. CONCLUSION

The foregoing analysis of the recent cases relied upon by Professor Helmholz demonstrates that there is no tenable basis for his broad conclusion that the American courts in recent times have consistently reached results inconsistent with generally accepted views as to the relevance of "accrual of a cause of action," the "subjective intent" of the adverse claimant, and—most significantly—the "good faith" or "bad faith" of the adverse claimant. Many of the cases either reach a result contrary to that for which they are cited[228] or simply do not involve the issue Professor Helmholz asserts that they involve.[229] The two recent cases adopting the "Connecticut rule" as to the effect of a landowner's possession of a neighbor's land under a "mistaken, but honest belief" that

226. Collier v. Welker, 19 N.C. App. 617, 199 S.E.2d 691 (1973), *cited in Adverse Possession, supra* note 1, at 355 n.93. With "color of title," the statutory limitation period in North Carolina is 7 years, N.C. GEN. STAT. § 1-38 (1983); and without "color of title" the period is 20 years, N.C. GEN. STAT. § 1-40 (1983).

227. *Adverse Possession, supra* note 1, at 354.

228. *See, e.g.*, Moss v. James, 411 S.W.2d 104 (Mo. 1967), *cited in Adverse Possession, supra* note 1, at 342 n.48; Hoppe v. Sauter, 416 S.W.2d 912 (Tex. Civ. App. 1967), *cited in Adverse Possession, supra* note 1, at 344 n.59; Howard v. Kunto, 3 Wash. App. 393, 477 P.2d 210 (1970), *cited in Adverse Possession, supra* note 1, at 343 n.53.

229. *See, e.g.*, SSM Inv. v. Siemers, 291 N.W.2d 383 (Minn. 1980), *cited in Adverse Possession, supra* note 1, at 345 n.62; Grimstad v. Dordan, 256 Or. 135, 471 P.2d 778 (1970), *cited in Adverse Possession, supra* note 1, at 345 n.62.

the possessor owns the land[230] fail to provide any support whatever for Professor Helmholz's assertion that the courts "regularly award title to the good faith trespasser, where they will not award it to the trespasser who knows what he is doing at the time he enters the land in dispute." Similarly, the cases denying claims of title by adverse possession on the ground that the claimant's possession was "somehow less than sufficient," or on the ground that the claimant's possession was "permissive," or on the ground that the claimant "knew enough of the true state of the title to offer money to the record owner" fail to provide substantial support for Professor Helmholz's conclusions.[231] In most of the cases of the latter types, the stated grounds of decisions adequately justify the result, and no apparent reason exists to attribute to the courts a disingenuous intent to conceal the "true" basis of their decisions.[232]

Assuming that the number of adverse possession cases decided in appellate courts during the period surveyed by Professor Helmholz is larger than one might expect in a field of law where the rules are supposedly well-settled,[233] how can the substantial volume of litigation be explained? In all probability, it is a result of the continuing confusion of the courts as to the meaning of the "claim of right" requirement.[234] The cases in

230. *See* Hewes v. Bruno, 121 N.H. 32, 424 A.2d 1144 (1981), *cited in Adverse Possession, supra* note 1, at 340 n.37; Mannillo v. Gorski, 54 N.J. 378, 255 A.2d 258 (1969), *cited in Adverse Possession, supra* note 1, at 340 n.36.

231. *See supra* notes 138-75 and accompanying text.

232. In the few cases in which the court adverts to the fact that the adverse claimant did not honestly believe that he owned the land in question, the other factors were arguably sufficient to justify the result. But in most of the cases there is no reference to the adverse claimant's lack of "good faith." Unless one starts with an assumption that "good faith" or "bad faith" are decisive, or at least of great significance, the reasonable conclusion is that "good faith" and "bad faith" are not relevant in such cases.

233. As suggested *supra* note 5 and accompanying text, the number of adverse possession cases during the period Professor Helmholz surveyed does not seem to be greatly in excess of the number of bailment cases decided during the same period.

234. *See supra* note 75. The idea that the "claim of right" must be rightful was repudiated in Humbert v. Trinity Church, 24 Wend. 587, 610 (N.Y. 1840); thereafter American courts generally have held that a "claim of right" is sufficient whether it is asserted in "good faith" or in "bad faith." *See also* 4 H. TIFFANY, *supra* note 7 at § 1147:

> It has been said that by claim of right or title, in connection with the doctrine of adverse possession, is meant merely 'an intention to appropriate and hold the land as owner, and to the exclusion, rightfully or wrongfully, of every one else.' It is most unfortunate, if this is the idea which the courts intend to convey, that they use language which on its face means something entirely different. The presence of such an intention to appropriate is no doubt necessary for the purpose of adverse possession, but this is . . . not because without it the possession would not be adverse, but because without it there would be no possession.

Id. at 791.

which a dispute exists as to the ownership of a strip of land owned by one landowner but actually possessed by an abutting landowner for the statutory limitation period (*i.e.*, cases in which the courts are divided between the "Maine rule" and the "Connecticut rule" with respect to the effect of a "mistaken, but honest belief" of the possessor that he owned the land in dispute) clearly demonstrate this confusion.[235] A case[236] in which the New York Court of Appeals held that the adverse claimant had failed to prove the "actual . . . occupation of premises under a claim of title" required by the applicable statute of limitations may constitute the epitome of this confusion. Given the majority's view of the facts, the court could have based its decision simply on the conclusion that proof of "actual" possession as defined in the statute was lacking. But the majority also seems to have thought that the required "claim of title" was lacking both with respect to a part of the premises upon which the adverse claimant had built a shack, and with respect to another part of the premises upon which his garage encroached. With respect to the first portion of the premises the court apparently thought the claimant had no "claim of right" because he knew the land *did not* belong to him; and, with respect to the second portion of the premises, the court apparently thought that he had no "claim of right" because he thought the land *did* belong to him.[237] As one commentator observed, the majority opinion might lead one to "conclude that the only true adverse possessor is one who, with

235. *See supra* notes 87-98 and accompanying text.

236. Van Valkenburgh v. Lutz, 304 N.Y. 95, 106 N.E.2d 28, *reh. denied,* 304 N.Y. 590, 107 N.E.2d 82 (1952).

237. *See* 304 N.Y. at 98-99, 106 N.E.2d at 31-32, in which the court said:

> According to the proof the small shed or shack was located on the subject premises about 14 feet from the Lutz boundary line . . . and, as Lutz himself testified, he knew at the time it was not on his land and, his wife, a defendant here, also testified to the same effect.
>
> The statute requires as an essential element of proof, recognized as fundamental on the concept of adversity since ancient times, that the occupation of premises by "under a claim of title." . . . [When this is] lacking [possession] will not operate to bar the legal title . . . no matter how long the occupation may have continued.
>
> Similarly, the garage encroachment, extending a few inches over the boundary line, fails to supply proof of occupation by improvement. Lutz himself testified that when he built the garage he had no survey and thought he was getting it on his own property, which certainly falls short of establishing that he did it under a claim of title hostile to the true owner.

Id.

Although the quoted passage shows confusion of the issue whether a statutorily defined "actual" possession existed with the issue whether the statute's "claim of title" requirement was met, the court seems to have thought that the adverse claimant lacked "claim of title" to either part of the tract.

respect to the title of the land, has no views whatever."[238]

The substantial amount of adverse possession litigation in recent years may also reflect the fact that it is often difficult to determine, in adverse possession cases, whether the adverse claimant's acts amounted to "actual possession" or only to a series of separate trespasses;[239] whether the claimant's possession was "permissive" and therefore not "adverse" at its inception and, if so, whether the claimants' later conduct converted possession into an "adverse" possession;[240] and whether the claimant's conduct subsequently converted a possession that was prima facie "adverse" at its inception into a "permissive" possession.[241] These are difficult factual questions. The cases that Professor Helmholz cites do not justify the conclusion that, in close cases, the courts simply decide for "good faith" claimants and against "bad faith" claimants.

Professor Helmholz concedes that a substantial number of the cases he surveyed do, in fact, hold that an adverse claimant who acts in "bad faith" may nevertheless acquire title by adverse possession, but he argues that "equitable" considerations rather than "the principle that the state of mind of the possessor is irrelevant" explain the result in many of these cases.[242] However, as has been demonstrated, a careful reading of these cases shows that they do not support Professor Helmholz's argument.[243]

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238. C. CALLAHAN, ADVERSE POSSESSION 10 (1961). The author suggests the relevance of "subjective factors" other than "good faith" and "bad faith" on the basis of his examination of the briefs in *Van Valkenburgh*:

> . . . Lutz's actions according to the brief of the plaintiff "were typical of an irresponsible squatter, guided by motives of pure expediency. . . . [He] did nothing to improve the land but littered the woods around his house with filth and junk, brought in by scavenging the dump. On the other hand the plaintiff . . . is merely trying to obtain the normal rights of ownership . . . and to protect his home by cleaning up the neighborhood." The defendants' brief looks at the matter differently. In their view, the plaintiff "obviously manifesting his self-proclaimed superiority to poor people, . . . means . . . to clear the neighborhood of the Lutz family who were born, nourished and grew to manhood and womanhood there long before Van Valkenburgh took it upon himself to attempt, at all costs, to drive them out."

Id. at 8-9.

239. *See Adverse Possession, supra* note 1, at 342-43 nn.47-51. For an extensive citation of earlier cases, see 2 AM. L. PROP., *supra* note 7, at § 765; 4 H. TIFFANY, *supra* note 7, at § 1138; 5 G. THOMPSON, *supra* note 15, at § 2542.

240. *See Adverse Possession, supra* note 1, at 343-44 nn.54-58. For an extensive citation of earlier cases, see 3 AM. L. PROP., *supra* note 7, at §§ 15.6-.7; 4 H. TIFFANY, *supra* note 7, at §§ 1178-90.0; 5 G. THOMPSON, *supra* note 15, at § 2548.

241. *See Adverse Possession, supra* note 1, at 346-47 nn.63-66. *See also* 3 AM. L. PROP., *supra* note 7 § 15.9 at 810-12 nn.16-21; 4 H. TIFFANY, *supra* note 7, at §§ 1163-66; 5 G. THOMPSON, *supra* note 15 § 2552 at 663-64 nn.34-42.

242. *See Adverse Possession, supra* note 1, at 347-48.

243. *See supra* text accompanying notes 176-81.

Moreover, it is worth noting that all of the cases Professor Helmholz cites on this point were, in substance, actions in which the adverse possessor sought to "quiet title" against the record owner of the land in question;[244] and that a substantial majority of the other cases Professor Helmholz cites in support of his broader conclusions were also in substance actions to "quiet title."[245] Although statutes in most jurisdictions

244. *See Adverse Possession, supra* note 1, at 348 nn.69-72. All of these cases involved either an adverse claimant's action (or, in a few, a counterclaim) to "quiet title," although in some cases the type of relief sought was differently described, *e.g.*, "to establish adverse title" or "to determine ownership". What are, in substance, actions to "quiet title" may be called a variety of names in different jurisdictions, including, in addition to those just mentioned, actions to "determine a boundary" or to "confirm title". In Texas, an adverse claimant in possession may bring an action of "trespass to try title" in order to establish a title based on adverse possession for the statutory limitation period.

245. An examination of most of the cases Professor Helmholz cited as directly supporting his conclusions as to the "subjective intent," "good faith," and "bad faith" of adverse claimants indicates that, in substance, the following cases involved an adverse claimant's attempt to "quiet title" against the record owner: See Chapman v. Moser, 532 F.2d 426 (5th Cir. 1976; Gary v. Dane, 411 F.2d 711 (D.C. Cir. 1969); M.C. Dixon Lumber Co. v. Mathison, 289 Ala. 229, 266 So. 2d 841 (1972); Kittrell v. Scarborough, 287 Ala. 155, 249 So. 2d 814 (1971); Ayers v. Day & Night Fuel Co., 451 P.2d 579 (Alaska 1969); Conwell v. Allen, 21 Ariz. App. 383, 519 P.2d 872 (1974); Barclay v. Tussey, 259 Ark. 238, 532 S.W.2d 193 (1976); Davis v. Mayweather, 255 Ark. 966, 504 S.W.2d 741 (1974); Corn Ins. Agency v. Darby Builders, 254 Ark. 1004, 497 S.W.2d 260 (1973); Clark v. Mathis, 253 Ark. 416, 486 S.W.2d 77 (1972); Massey v. Price, 252 Ark. 617, 480 S.W.2d 337 (1972); Vick v. Berg, 251 Ark. 573, 473 S.W.2d 858 (1971); Dillaha v. Temple, 590 S.W.2d 331 (Ark. App. 1917); Anderson v. Cold Spring Tungsten, Inc., 170 Colo. 7, 458 P.2d 756 (1969); DeCola v. Bochatey, 161 Colo. 95, 420 P.2d 395 (1966); Brehm v. Johnson, 531 P.2d 991 (Colo. App. 1974); Niles v. Churchill, 29 Colo. App. 2d 283, 482 P.2d 994 (1971); Loewenberg v. Wallace, 151 Conn. 355, 197 A.2d 634 (1964); Gameson v. Remer, 96 Idaho 789, 537 P.2d 631 (1975); Joiner v. Janssen, 85 Ill. 2d 74, 421 N.W.2d 170 (1981); Patient v. Stief, 49 Ill. App. 3d 99, 363 N.E.2d 927 (1977); Ewald v. Horenberger, 37 Ill. App. 3d 348, 345 N.E.2d 524 (1976); Guinzy v. Kratz, 28 Ill. App. 3d 500, 328 N.E.2d 699 (1975); Ford v. Eckert, 406 N.E.2d 1209 (Ind. App. 1980); Penn Cent. Transp. Co. v. Martin, 170 Ind. App. 519, 353 N.E.2d 474 (1976); Carpenter v. Ruperto, 315 N.W.2d 782 (Iowa 1982); Hungerford v. Hungerford, 234 Md. 338, 199 A.2d 109 (1964); Shaw v. Solari, 8 Mass. App. 151, 392 N.E.2d 853 (1979); Dunlop v. Twin Beach Park Ass'n, 111 Mich. App. 261, 314 N.W.2d 578 (1982); Whitehall Leather Co. v. Capek, 4 Mich. App. 52, 143 N.W.2d 779 (1966); SSM Invs. v. Siemers, 291 N.W.2d 383 (Minn. 1980); Woodall v. Ross, 317 So. 2d 892 (Miss. 1975); Hardy v. Lynch, 258 So. 2d 414 (Miss. 1972); Bayless v. Alexander, 245 So. 2d 17 (Miss. 1971); Quates v. Griffin, 239 So. 2d 803 (Miss. 1970); Coleman v. French, 233 So. 2d 796 (Miss. 1970); Allen v. Thomas, 215 So. 2d 882 (Miss. 1968); Roth v. Flieg, 536 S.W.2d 39 (Mo. 1976); Walker v. Walker, 509 S.W.2d 102 (Mo. 1974); Wilton Boat Club v. Hazell, 502 S.W.2d 273 (Mo. 1973); Crane v. Loy, 436 S.W.2d 739 (Mo. 1968); Moss v. James, 411 S.W.2d 104 (Mo. 1967); Ross v. McNeal, 618 S.W.2d 224 (Mo. App. 1981); Monnig v. Lewis, 617 S.W.2d 492 (Mo. App. 1981); John v. Turner, 542 S.W.2d 293 (Mo. App. 1976); Cash v. Gilbreath, 507 S.W.2d 931 (Mo. App. 1974); Martin v. Randono, 175 Mont. 321, 573 P.2d 1156 (1977); Magelssen v. Atwater, 152 Mont. 409, 451 P.2d 103 (1969); Barnes v. Milligan, 200 Neb. 450, 264 N.W.2d 186 (1978); Foos v. Reuter, 180 Neb. 301, 142 N.W.2d 552 (1966); Hewes v. Bruno, 121 N.H. 32, 424 A.2d 1144 (1981); Mannillo v. Gorski, 54 N.J. 378, 255 A.2d 258 (1969); Brylinski v. Cooper, 95 N.M. 580, 624 P.2d 522 (1981);

now authorize actions to quiet title, they are "equitable" in origin and character.[246] Thus it would not be surprising to find the courts paying attention to "equitable considerations" when the object of the adverse possessor is to "quiet" a title acquired by adverse possession.[247] What is surprising is that "equitable considerations" are so seldom mentioned in the cases.[248]

Gerwitz v. Gelsomin, 69 A.D.2d 992, 416 N.Y.S.2d 127 (1979); Lewis v. Village of Lyons, 54 A.D.2d 488, 389 N.Y.S.2d 674 (1976); Campano v. Scherer, 49 A.D.2d 642, 370 N.Y.S.2d 237 (1975); West v. Tilley, 33 A.D.2d 228, 306 N.Y.S.2d 591 (1970); Collier v. Welker, 19 N.C. App. 617, 199 S.E.2d 691 (1973); Tindle v. Linville, 512 P.2d 176 (Okla. 1973); Leach v. West, 504 P.2d 1233 (Okla. 1972); Caywood v. January, 455 P.2d 49 (Okla. 1969); Venator v. Ouidf, 285 Or. 19, 589 P.2d 731 (1979); Nedry v. Morgan, 284 Or. 65, 584 P.2d 1381 (1978); Beaver v. Davis, 275 Or. 209, 550 P.2d 428 (1976); Grimstad v. Dordan, 256 Or. 135, 471 P.2d 778 (1970); Foss v. Paulson, 255 Or. 167, 465 P.2d 221 (1970); White v. Chandler, 52 Or. App. 951, 630 P.2d 372 (1981); Breuer v. Covert, 47 Or. App. 225, 614 P.2d 1169 (1980); Garrett v. Lundgren, 41 Or. App. 23, 596 P.2d 1317 (1979); Spangler v. Schaus, 106 R.I. 795, 264 A.2d 161 (1970); Morgan v. Dillard, 61 Tenn. App. 519, 456 S.W.2d 359 (1970); Hill v. Hill, 55 Tenn. App. 589, 403 S.W.2d 769 (1965); Wolgamot v. Corley, 523 S.W.2d 491 (Tex. Civ. App. 1975); Hensz v. Linnstaedt, 501 S.W.2d 463 (Tex. Civ. App. 1973); McDonald v. Batson, 501 S.W.2d 449 (Tex. Civ. App. 1973); Nagel v. Hopingardner, 464 S.W.2d 472 (Tex. Civ. App. 1971); Lundelius v. Thompson, 461 S.W.2d 153 (Tex. Civ. App. 1971); Hoppe v. Sauter, 416 S.W.2d 912 (Tex. Civ. App. 1967); Leon v. Dansie, 639 P.2d 730 (Utah 1981); Holbrook v. Carter, 19 Utah 2d 288, 431 P.2d 123 (1967); Walton v. Rosson, 216 Va. 732, 222 S.E.2d 553 (1976); Howard v. Kunto, 2 Wash. App. 393, 477 P.2d 210 (1970); Somon v. Murphy Fabrication & Erection Co., 232 S.E.2d 524 (W. Va. 1977); Beasley v. Knoczal, 87 Wis. 2d 233, 275 N.W.2d 634 (1979); Gray v. Fitzhugh, 576 P.2d 88 (Wyo. 1978); Petrusic v. Carson, 496 P.2d 70 (Wyo. 1972).

246. "Defendant's counterclaim is in the nature of a suit to quiet title, which is an equitable proceeding. ORS 105.605. Because the issues raised on appeal all relate to defendant's counterclaim, we treat the appeal, as have the parties, as an appeal from an equitable decree." Nedry v. Morgan, 284 Or. 65 n.1, 584 P.2d 1381 n.1 (1978).

For a full historical account of the development and present status of "equitable" and statutory actions to "quiet title," see 1 POMEROY, EQUITY JURISPRUDENCE §§ 246 & 1395-99 (5th ed. Symons 1941). *See also* MCCLINTOCK, EQUITY ch. 19 (2d ed. 1948); WALSH, EQUITY § 117 (1930).

247. A few early cases denied "quiet title" relief to a plaintiff claiming title by adverse possession. *See, e.g.*, Taylor v. Staples, 8 R.I. 170, 181 (1865) ("if a party has acquired another's land under the Statute of Possessions, he ought to be content with the title which the Statute gives him, and . . . he cannot, without some further equity, reinforce it by coming into chancery to compel a release of the title which he has superseded." This language was quoted in Day v. Proprietors of Swan Point Cemetery, 51 R.I. 213, 216-7, 153 A. 312, 313 (1931), in which the court also intimated that "color of title" plus "additional equities" would give the adverse possessor an "equitable" right to have his title by adverse possession "quieted." *Id. See also* Contee v. Lyons, 19 D.C. 207 (1890); McCoy v. Johnson, 70 Md. 490, 17 A. 387 (1889); Miller v. Robertson, 35 Can. Sup. Ct. 80 (1904). All three cases held that an adverse claimant does not have an "equitable" right to have his title "quieted." But as the cases cited *supra* note 245 clearly demonstrate, the great weight of authority is now to the contrary.

For a collection of pre-1932 cases, see Annot. 78 A.L.R. 24, 110-16 (1932).

248. The only case cited by Professor Helmholz in which the court clearly recognized the relevance of "equitable considerations" is Gary v. Dane, 411 F.2d 711 (D.C. Cir. 1969), holding that the

claimant's title to a strip of land along the edge of his neighbor's lot was "established by adverse possession, although the adverse possession was the result of an honest mistake as to the boundary." The court also held, however, that "[h]e who demands equity must do it" and, therefore, that "the declaration of title" in the adverse claimant should be conditioned both on his reimbursing the former owner for back taxes and his granting to the former owner "an easement allowing reasonable use of the strip [awarded to the adverse claimant] for wall maintenance, continued clearance for the exhaust fan, and continued drainage for [the former owner's] back lot." *Id.* at 715.